No. 12549

In the United States Court of Appeals for the Ninth Circuit

MIKE J. FEELEY, APPELLANT

v.

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, APPELLEE

APPEAL FROM THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLEE

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INDEX

TABLE OF AUTHORITIES

903403—50——1

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STATEMENT OF JURISDICTION

Appellant, defendant below, appeals from a judgment entered on January 20, 1950, by the United States District Court for the Western District of Washington, Northern Division, granting to appellee an injunction and directing restitution of rent overcharges (and from an order entered February 10, 1950, denying a motion for a new trial), pursuant to Section 206 (b) of the Housing and Rent Act of 1947, as amended (50 U. S. C. A. 1881 et seq.) (R. 2) Notice of Appeal was filed on April 10, 1950. Jurisdiction of this Court is invoked pursuant to Section 1291 of the Judicial Code (28 U. S. C. A. 1291).

STATUTES AND REGULATIONS

Applicable sections of the Housing and Rent Act of 1947, and its two annual Amendments (61 Stat. 193; 62 Stat. 93; and 63 Stat. 18; 50 U. S. C. A. 1881 et seq.), and of the Controlled Housing Rent Regulation (12 F. R. 4331; 13 F. R. 1861; 14 F. R. 1671; and 14 F. R. 2233) appear in full in the Appendix, pp. 48 to 59.

COUNTERSTATEMENT OF FACTS

The facts in this case are for the most part stipulated and, in any event, are not in dispute.

As set forth in the Stipulation (R. 10–13), the premises in question, located at 1535 Bellevue Avenue, Seattle, Washington, were operated as an apartment house prior to June 1948. On June 5, 1948, the tenants were evicted in order to make repairs and improvements in the property and the building was thereafter reopened for occupancy on September 1, 1948. The work done consisted of redecoration, cleaning, general rehabilitation, and a new roof, but no structural changes were made and the same units existed in the same space. Services not previously furnished (maid service, bedding, linen and laundering of linen, lights, cooking fuel, dishes and utensils) were made available and an awning bearing the name "Feeley's Apartment Hotel" was installed. Between some time prior to June 30, 1947, and until September 1, 1948, the establishment was known and operated as a "low class apartment house accommodation."

Both before and after September 1, 1948, the establishment had 17 units and 17 tenants (R. 40, 45).

The 17 units were, and are, each self-contained, with private kitchen and bath; no single room or sleeping-room accommodations were ever offered (R. 44). Since reopening, neither bell-boy nor telephone switchboard service has been rendered (R. 41, 42).

Although maximum rents were in effect for the units at the time of reopening (R. 10–11, 15) and defendant did not make inquiry of the Office of the Housing Expediter as to the controlled or decontrolled status[1] of the accommodations as renovated (R. 46), the new rentals charged bore no relationship to those theretofore established under the Act and applicable Regulation (R. 46).[2]

On February 20, 1949, suit was filed by the Expediter in the United States District Court, Western District of Washington, Northern Division (No. 2201) seeking restitution[3] to the tenants of overcharges and injunctive relief. Defendant's Amended Answer (R. 8–9) consists of a general denial to the allegations of the Complaint and the assertion that "he is entitled to continue operating the said premises as an

[1] Section 202 (c) (1) of the Act provides that hotels are exempted from the definition of the term "controlled housing accommodations" (*infra*, p. 48).

[2] The Stipulation recites that there is no dispute as to amounts of rent collected, the period of time for which collected, the persons from whom collected, the orders which established the maximum rents, and the fact that all authorized increases in maximum rents were based upon improvements and increases in service (R. 10–12).

[3] The measure of overcharges initially requested in the Complaint was based upon the order of June 3, 1943, establishing maximum rents. Upon issuance of the rental adjustment order of May 18, 1949, the Expediter substantially reduced the amount of claimed overcharges (see List No. 2, R. 15).

apartment-hotel without being required to charge the rate required under the 'Housing and Rent Act' of 1947 or 1948" (R. 9). At the trial, defendant specified the defenses to the action as (1) dismissal of the action was required since the tenants had not given written authorization to the Expediter to bring suit, (2) the establishment was a hotel within the meaning of Section 202 (c) (1) of the Act and therefore exempt from rent control, and (3) additional housing accommodations were created by conversion after February 1, 1947, within the meaning of Section 202 (c) (3) (A),[4] resulting in decontrol. At the trial, the evidence consisted of the Stipulation (R. 10–13) and the testimony of one witness presented by defendant (R. 38); the trial court also made a personal inspection of the subject premises (R. 48, 55). After these proceedings, the trial court gave its oral opinion (R. 51–55), followed by Findings of Fact and Conclusions of Law (R. 17–22) which rejected defendant's claim to decontrol, and Judgment ordering restitution to the several tenants in the sum of $1,498.31 and enjoining demand and receipt of rents higher than those established under the Act. De-

[4] Section 202 (c) (3) (A) of the Act provides as follows: "(3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall remain in full force and effect."

fendant's Motion for a New Trial (R. 25)[5] was denied on February 20, 1950 (R. 59) and Notice of Appeal was filed April 10, 1950 (R. 31).

ARGUMENT

I

There is no merit in the contention that repairs made to the premises in question "created new or additional housing"

1. In his first assignment of error, appellant argues that he "created new or additional housing" (Br. 8). The short answer to this contention is that the appellant stipulated at trial that "the same units in the same space existed upon reopening as existed prior thereto" (Par. 10, R. 13). Since he admitted in the Court below that no new or additional units were created, it is specious for him to argue the contrary in this Court. Moreover, the Court below found as a fact that no additional housing accommodations were created by conversion (Finding 2, R. 20). Nowhere in appellant's brief is there anything which

[5] This motion was based, among other grounds, on the fact that the defendant learned subsequent to the trial that he was operating the premises at a loss. According to the affidavit of Miss Foughty, defendant's employee, the loss was incurred through her failure to supply the Office of the Housing Expediter with the proper figures in her application for a "fair net operating income," as provided in Section 204 (b) (1) of said Act (*infra*, p. 52) (R. 28). The Act, nevertheless, and the Regulations issued pursuant thereto (Amendment 92, 14 F. R. 2233), provide for a "fair net operating income" upon application (825.5 (a) (18) (ii)) and further provide for "successive petitions" (825.5 (a) (18) (iii)). If defendant operated at a loss as stated in his motion for a new trial, the fault was his own failure to proceed properly, and not that "the Local Area Expediter had arbitrarily established monthly rates which violated Sec. 204 (b) (1) * * *" (R. 27).

demonstrates or even suggests that the trial court's finding in this respect was so manifestly erroneous that it should be disturbed (Rule 52 (a), Federal Rules of Civil Procedure, 28 U. S. C. A. following Sec. 723c).

It is uncontroverted in the record and, moreover, appellant expressly agrees that the premises in question were on June 1, 1948, and prior thereto operated "as a low class apartment house" (Par. 10, R. 13). Appellant further agrees that from June 5, 1948, to September 1, 1948, the building was vacant and that "the apartments were redecorated, cleaned up and generally rehabilitated" (id.). And finally appellant agrees that "no structural changes were made in the individual units" (id.).

The appellant, pursuant to the Expediter's Controlled Housing Rent Regulation (12 F. R. 4331) has already applied for and obtained a substantial increase in rent (Par. 5, R. 11) based upon these major improvements (*infra,* p. 57). In addition to this substantial increase the appellant was also entitled to an increase, if proper, in order to obtain "a fair net operating income".[6] These provisions are by their very nature complementary and not mutually exclusive, so that an increase under Section 5 (a) (1) of the Regulation could not adversely preclude an

[6] This provision was written into the 1949 amendment, which became effective April 1, 1949. The Expediter issued his regulation May 1, 1949, effective April 1, 1949 (14 F. R. 2233) to provide for fair net operating return. (Sec. 5 (a) 18 of Regulation, *infra,* p. 58.)

application for a fair net operating income as provided by Sec. 5 (a) 18 of the Regulation issued pursuant to the Act. He is entitled to a fair net operating return by the terms of the Act and Regulation, and may obtain it by applying for it. The alleged failure of the appellant to obtain the benefits of the Act and Regulation are, by his admission, the result of his own failure to bring all the facts before the Expediter (R. 28–29). As shall be shown hereafter, *infra,* p. 41, appellant has no valid cause for complaint because he has failed to exhaust his administrative remedies. In any event, his failure to obtain the statutory benefits are not grounds for decontrol of his property. Appellant conceded that "the quality of the accommodations is better, * * * but not structural changes made" (R. 45); the Court found no additional accommodations were created, and appellant has utterly failed to establish the burden cast upon him of proving that he comes within the exemption of the Act. (*Lassiter* v. *Atkinson,* 162 F. 2d 774, 778 (C. A. 9th); *Walling* v. *General Industries,* 330 U. S. 545, 548; *Woods* v. *Oak Park Chateau Corp.,* 179 F. 2d 611, 614 (C. A. 7th)).

The appellant may possibly, upon a proper showing and by availing himself of remedies in the administrative forum, establish that he is entitled to a further increase in his maximum rental (*infra,* p. 58).

2. The legislative history of Section 202 (c) (3) (A) (*infra,* p. 50) clearly shows that the Congress intended to encourage the creation of more housing than existed on February 1, 1947. In reporting the bill which eventually became the Housing and Rent

Act of 1947 (P. L. 129, 80th Cong., 1st Sess.), the House Banking and Currency Committee stated that there were two types of accommodations excluded from controls. The first of which "included * * *, housing accommodations converted from existing private residential use in rental housing accommodations providing additional housing accommodations" (H. Rep. 317, 80th Cong., 1st Sess., p. 13). It was the expressed hope of the Committee that "this action [decontrol] * * * will give added impetus *to the conversion of existing construction into additional rental units,* * * *" (id., p. 14). [Emphasis added.] The Committee desired this exclusion from control to "stimulate the provision of sorely needed rental units" (id., p. 13).

The Expediter issued the Controlled Housing Rent Regulation (12 F. R. 4331) carrying out the provisions of the Act. In that Regulation he listed those accommodations "to which this regulation does not apply" (Section 1 (b), *infra,* p. 54). Among those accommodations exempted were "additional housing accommodations created by conversion on or after February 1, 1947 * * *" (Par. 8, *infra,* p. 54). Conversion was defined in that paragraph as (1) a structural change from nonhousing use, or (2) "a structural change in a residential unit or units involving substantial alterations or remodeling *and resulting in the creation of additional housing accommodations."* [Emphasis added.] This regulation was in effect until the passage of the Act of 1948 (P. L. 464—80th Cong., 2d Sess.).

In amending the original Act, the Congress also amended Section 202 (c) (1), (2), and (3), but did not in any way change the "conversion" provision, or direct the Expediter to amend his Regulation, as was done respecting Section 202 (c) (1) defining hotels (See p. 3, H. Rep. 1560, 80th Cong., 2d Sess.). Thus, the Expediter's regulation was ratified by the reenactment of the Act without such change. Especially is this so since the Congress fully examined the operation of that Section, and ordered changes in certain portions of it.

There can be no serious dispute that Congressional reenactment of a law which has been interpreted by regulation constitutes ratification of that regulation (*Bowles* v. *Wheeler,* 152 F. 2d 34, 38 (C. A. 9th), certiorari denied, 326 U. S. 775; *Pinkus* v. *Porter,* 155 F. 2d 90, 93 (C. A. 7th); *Woods* v. *Oak Park Chateau Corp.,* 179 F. 2d 611, 613 (C. A. 7th); *United Labor Committee* v. *Woods,* 175 F. 2d 967 (E. C. A.)). In the *Wheeler* case, *supra,* this Court said on this point:

> With this frank and illuminating explanation and interpretation of departmental procedure before it, Congress extended the life of the Act. When reenactment of the statute occurs legislative ratification of the administrative interpretation may well be inferred. See *Green Valley Creamery* v. *United States,* 1 Cir., 108 F. 2d 342; *Brewster* v. *Gage,* 280 U. S. 327, 50 S. Ct. 115, 74 L. Ed. 457; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 51 S. Ct. 510, 75 L. Ed. 1183. If Congress was averse to this type of enforcement operations, it could have amended the enforcement provisions but it did not.

> Courts are not barred from the use of such legislative history which are pertinent aids to statutory construction and legislative intent.

Subsequent to the effective date of the Act of 1948 (April 1, 1948), and prior to the renting of these accommodations (Par. 10, R. 12), the Expediter issued a series of interpretations and published them. (August 25, 1948) (13 F. R. 5001–03.) The Expediter defined the word "conversion" to mean: "(1) a change in a structure from a nonhousing to a housing use, or (2) a structural change in a residential unit or units involving substantial alterations or remodeling and *resulting in the creation of additional housing accommodations.*" [Emphasis added.] He further provided that "where there has been a structural change *involving substantial alteration or remodeling, decontrol occurs only if additional housing accommodations result from this work*" (Par. 5, 13 F. R. 5002). [Emphasis added.] The determination of whether "additional housing accommodations" are created "is made by comparing the number of dwelling units before and after the conversion" (Par. 6, id.).

With these interpretations of record, the Congress again amended the Act (Housing and Rent Act of 1949, P. L. 31, 81st Cong., 1st Sess., 63 Stat. 18). In amending Section 202 (c) (3) (A) (*infra,* p. 50), the Congress not only approved the prior regulations and interpretations, but also wrote these provisions into the Act itself. Both the House and Senate Committee specifically adopted the "conversion" interpretations of the Expediter. In reporting its amendment adopting the Expediter's regulation, the House Com-

mittee said that this amendment "would exclude from the category of controlled housing accommodations any housing accommodation *created* by a change from a nonhousing to a housing use on or after February 1, 1947" (P. 9, H. Rep. 215, 81st Cong., 1st Sess.) and, also, that "the existing exemption of *additional* housing accommodations created by conversion on or after February 1, 1947, is continued * * *" (id.) [Emphasis added.]

In *Woods* v. *Ginocchio,* 180 F. 2d 484 (C. A. 9th), this Court agreed that a "conversion" of a building is within Section 825.1 (b) (8) of the Regulation, if it is:

> * * * "a structural change in a residential unit or units involving substantial alterations or remodeling and resulting in the creation of additional housing accommodations."

The Senate Committee pointed out that the conversion provisions had been abused in the past. They were, therefore, tightening them to apply after April 1, 1949, only to those conversions which "actually resulted in additional self-contained family units" (P. 8, Sen. Rep. 127, 81st Cong., 1st Sess.). In other words, the Senate not only changed the Act to conform to the Expediter's definition of additional housing accommodations, but insisted that these additional units be of a certain type and standard.

In view of this legislative history, there can be no serious doubt that the Expediter's interpretation of the Act is entitled to great weight. *Skidmore* v. *Swift & Co.,* 323 U. S. 134, 139, 65 S. Ct. 161. This is the more so, "when it involves a contemporaneous con-

struction of a statute by men charged with the responsibility of setting its machinery in motion." *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294, 315, 53 S. Ct. 350. Cf. also *Porter* v. *Crawford and Doherty Foundry Co.,* 154 F. 2d 431, 433, cert. denied 329 U. S. 720, and *Bowles* v. *Glick Bros.,* 146 F. 2d 566, 568 (C. A. 9), dealing with the weight to be given administrative interpretations of the Administrator's regulations.

Since these interpretations have been accepted by the Congress and embodied in the Act, they cannot be said to be "irrational" or inconsistent with the Act. That being so, the appellant's admission that his alterations raised "the quality of the accommodations, * * * but not structural changes made," is conclusive against his contention that his premises are decontrolled by virtue of the provisions of Section 202 (c) (3) (A).

3. Nor does it avail the appellant to argue that this housing accommodation was "a theoretic condemned and abandoned building" at the time when he purchased it from the former owner (Par. 1 (a), Br. 4) and, further, that "Actually then, although not technically, it was a condemned and abandoned building *when the tenants moved out"* (Br. 8) (Emphasis added). This argument is, of course, in derogation of his previous argument, that the improvements *per se* decontrolled the premises in question. Appellant recognizes here that the creation of additional housing accommodations are essential to decontrol pursuant to Section 202 (c) (3) (A). Therefore, he argues now that he did create additional housing accommo-

dations because if he had not rehabilitated these apartments the city authorities would have taken them off the market.

It has been held that the "repair of old accommodations temporarily unfit for human occupation * * *" does not exempt housing accommodations from control as newly constructed housing units. In *Elma Realty Co.* v. *Woods,* 169 F. 2d 172 (C. A. 1), the premises were destroyed by fire and rebuilt. In rejecting the appellant's claim of decontrol, the Court said (at p. 174):

> Had the appellant been forced to construct a new building on its land after the fire we may assume for present purposes that apartments therein, possibly even if substantially similar to the ones in its old building, would be new housing accommodations to which § 4 (e) of the Rent Regulation would apply. But it is clearly established that the appellant did not have to do this. It merely had to restore its old apartments after the fire, not build new ones, since the court below found as a fact that although "the premises were destroyed by fire to an extent which made them not habitable for human beings" enough was left "of the premises to be used as storage for furniture and other property."
>
> Obviously, therefore, we do not have here a case of construction of new accommodations, but clearly a case of repair of old accommodations made temporarily unfit for human occupation by casualty. Thus, although the appellant was undoubtedly entitled to an upward adjustment of its maximum rents after its apart-

> ments were again habitable, nevertheless the regulations do not permit it to increase its rents until after it has applied for and obtained permission to do so. *Thierry* v. *Gilbert,* 1 Cir., 147 F. 2d 603 * * *.

To accept appellant's argument as valid would place a premium on wrongdoing. A landlord could permit his premises to deteriorate, or to remain defective, so that they become hazards to the health, safety, and welfare of the community. The city authorities in the protection of the public would threaten to evict the occupants of these dwellings. If the landlord repaired the defects, and brought them into conformity with the local codes, his premises would be decontrolled under Section 202 (c) (3) (A) because he, thereby, created an "additional housing accommodation." That this contention cannot stand is shown by the apt answer made to it by the Court below:

> * * * If the Court were to establish the principle that whenever premises had gotten badly in repair and the landlord or owner did not repair them, then he could be freed from rent control by repairing his property, the Court would establish a most dangerous precedent. The Court would advise anyone who owned property that if they just disregarded the welfare of the tenants by allowing the roof to leak and the furnace to get out of repair so that the building would be condemned that then they could be freed from rent control and get a reward for having disregarded the welfare of the occupants of the building (R. 57).

4. Every Federal Court of original and appellate jurisdiction, including this Court, which has passed upon the problem, has recognized that a conversion must result in the creation of additional housing accommodations, in order to be exempt from federal rent control. The establishment of that fact has been recognized in those cases where the Expediter did not prevail for other reasons not material here. In *Woods* v. *Ginocchio,* 180 F. 2d 484 (C. A. 9th), this Court referred to an elaborate series of structural changes (See, footnote, 180 F. 2d 487–88) which created additional rooms resulting in decontrol. But the decision clearly turned upon the creation of additional accommodations. So too, the conversion of "the original five-room flat" into "two newly arranged apartments" affected decontrol in *Flynn* v. *Woods,* 181 F. 2d 867, 868 (C. A. 8), since there were two apartments where there was previously only one.

The district courts have been equally aware that the benefits of Section 202 (c) (3) (A) must be withheld where additional housing accommodations have not been created, or where they have been ostensibly created by the "locking of a few doors." Unreported decisions in which the official interpretation, *infra,* p. 59, has been followed are *Woods* v. *Rettas* (D. C. N. D. N. Y.), No. 3173, decided March 25, 1949, and *Woods* v. *Anderson* (D. C. E. D. Mich.), No. 7977, decided June 20, 1949.[7] In the *Rettas* decision the defendants made substantial alterations

[7] Findings of fact and conclusions of law in these decisions appear in the Appendix (*infra*, pp. 72–80).

by converting premises from a two-family to a three-family house, and modernized the second floor apartment by installation of new plumbing, fixtures, and cabinets. In such alteration a stairway leading from the second floor apartment was enlarged for access to an upper floor, and a new apartment was created on the third floor. Following the official interpretation, the Court held that after such alterations the second floor apartment did not constitute "additional housing accommodations created by conversion," and were not removed from control under the provisions of the Act in Section 202 (c) (3).

In *Woods* v. *MacNeil Bros. Co.,* 80 F. Supp. 920 (D. C. Mass.), it was held that merely providing additional facilities to improve existing accommodations did not constitute new accommodations within the exemption provided in Section 202 (c) (3) of the Act. See too, *Woods* v. *Comstock,* No. 3138 (N. D. N. Y.), September 22, 1949, unreported (*infra,* p. 80); *Woods.* v. *Malas,* 81 F. Supp. 485 (W. D. Wis.); *Woods* v. *Sequin,* No. 7262 (D. C. Mass.) (*infra,* p. 83).

None of the cases relied upon by appellant are in point. *Woods* v. *Baker,* 84 F. Supp. 339 (D. C. La.), is clearly distinguishable. Unlike the facts present in the instant case, in the *Baker* case there were not only structural changes but also there were "now two complete and well-adopted units where before there was only one" (p. 341).

Another case cited by appellant is *United States* v. *Beatty,* 88 F. Supp. 791 (S. D. Iowa). There the Court accepted the regulation and the interpretation

above cited as binding (p. 794). It concluded, however, that "the erection of a permanent wall," the "erection of an off-set wall," "the creation of a small kitchenette," "A permanent brick wall was cut through and a new doorway built," "and an additional doorway constructed to separate the west front unit from the hall," plus electric wiring and separate meters and "an independent outside entrance" (88 F. Supp. at 793), created two housing accommodations "where one existed before" (p. 795). No such facts are present in the record presented by this case and clearly no more housing units in existence after conversion than there were before.

Woods v. *Polino,* 86 F. Supp. 650 (S. D. W. Va.), cited by appellant, did not involve conversion and, therefore, is irrelevant to the facts and the law governing the judgment entered in the Court below. From the foregoing, there can be little question but that the trial court properly found that appellant did not create additional accommodations as to be entitled to decontrol under Sec. 202 (c) (3) of the Act.

II

There is no merit to appellant's contention that his accommodations constituted a hotel entitled to decontrol under Section 202 (c) (1) of the Act

There is also no merit to appellant's claim to decontrol under Section 202 (c) (1) of the Act on the ground that his accommodations constituted a hotel.

The judgment of the trial court may be affirmed on either of two grounds (1) that appellant has failed to demonstrate the existence of the requisite factual

basis for satisfaction of the statutory conditions precedent to decontrol, or (2) that appellant has failed to show that the establishment was a "hotel" on the cut-off date, June 30, 1947, a condition which has received judicial approval and one within the intent of Congress.

A. Appellant's failure to present proper and sufficient factual support for the claimed exemption is fully supported by the record

In order for appellant to be entitled to the claimed exemption, he must show that the establishment enjoyed the status of a hotel by common knowledge in the particular community and that customary hotel services were furnished.

Sec. 202 (c) (1) provided as follows:[8]

> Sec. 202 (c) (1) those housing accommodations, in any establishment which is commonly

[8] As amended by the Housing and Rent Act of 1949, this Section now reads as follows:

"(c) The term 'controlled housing accommodations' means housing accommodations in any defense-rental area, except that it does not include—

"(1) (A) those housing accommodations, in any establishment which is located in a city of less than two million five hundred thousand population according to the 1940 decennial census and which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; or * * *

"(B) (2) the term 'hotel' means any establishment which on June 30, 1947, was commonly known as a hotel in the community in which it is located and was occupied by an appreciable number of persons who were provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; or"

known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service: or''

Whether appellant's accommodations fell within this exemption of the Act as to be decontrolled was primarily a question of fact for the trial court to decide. Indeed, this is the holding of the cases cited by appellant, p. 10 of brief, viz: *Woods* v. *Benson,* 177 F. 2d 543 (C. A, 8th); *Woods* v. *Western Holding Corp.,* 173 F. 2d 655 (C. A. 8th); *Woods* v. *Kourmadas,* 180 F. 2d 255 (C. A. 6th).

It was stipulated that prior to June 5, 1948, the structure was operated as an apartment house (R. 12). It was appellant's testimony that, beginning September 1948, after making repairs, he provided customary hotel services. Upon cross-examination, appellant testified that the only hotel desk present was one inside the door in the manager's apartment; that there was no elevator service; that there was no switchboard for telephone service (R. 42); that there was no individual telephone service in the units but merely phones in the hallway, and that there was nothing in the lobby except a place in which to sit down (R. 43). Appellant made no claim that he provided bellboy service.

Moreover, the burden of proof was upon appellant to show not only that he provided the services called for by Sec. 202 (c) (1) but likewise that the housing

accommodations were commonly known in the community as a hotel. No proof whatever was offered on this score.

Based upon the testimony in the case, the stipulation of the parties, and based upon the Court's *own personal* inspection of the premises, the trial court found as follows:

> * * * The premises were neither a hotel nor generally considered or reputed as such in the community or neighborhood, but the apartments and services rendered made the tenancy unique in that the tenants were not required to accept the premises on a month-to-month basis, but could obtain them on a daily basis, weekly basis, monthly basis, or on a combination of monthly, weekly, and daily bases * * * (R. 52).

Since this finding finds substantial support in the record, it should not be disturbed (*Woods* v. *Oak Park Chateau Corp., supra,* 179 F. 2d at pp. 614–615).

B. The need for relating the evidence to the June 30, 1947, cut-off date is supported by judicial opinion and the legislative history incident to the statutory provisions in question

Apart from the facts which disqualified appellant from claiming the decontrol exemption available for hotel accommodations, plaintiff's accommodations were not eligible for decontrol under Section 202 (c) (1) of the Act because it was not a "hotel" on June 30, 1947, the cut-off date of the Act.

1. The judicial decisions

The only decision of an appellate court squarely in point on this issue is *Woods* v. *Oak Park Chateau*

Corp., supra, 179 F. 2d at p. 613. In that case, the Court agreed with the Expediter's claim that the Act conferred the decontrol exemption only upon those housing accommodations which satisfied the statutory requirements of a hotel on June 30, 1947. The Circuit Court posed the problem before it as follows:

> Before proceeding to discuss whether the court erred in holding that the units in question were not exempt, we must consider defendants' claim that the insertion by the Expediter of the June 30, 1947, cut-off date, in his regulations is "an attempt to defeat an exemption conferred by the Act." The argument is that the exemption arose from the factual situation at the time of the overcharges rather than from the factual situation on June 30, 1947.

After reviewing the provisions of the Act and Regulation, the Court said:

> * * * And since we entertain no doubt that Congress intended to confer an exemption upon those accommodations which satisfied the statutory requirements on June 30, 1947, it follows that the court did not err in concluding that the test date for determining decontrol of housing accommodations under the Act was June 30, 1947 (p. 613).

Other cases decided by Circuit Courts of Appeal bearing upon Section 202 (c) of the Act either are inapplicable to the question of the validity of a cut-off date for hotels or strongly tend to support appellee's position.

This Court had occasion to consider an unrelated portion of Section 202 (c) in *Koepke* v. *Fon-*

tecchio, 177 F. 2d 125. The statutory provisions there involved provided for an exemption from rent control of "(2) any motor court or any part thereof, or any tourist home serving transient guests exclusively, or any part thereof." The Court posed the issue: "It is apparently the contention of appellant that housing accommodations, to qualify for decontrol as a motor court, must have been a motor court on June 30, 1947." Of controlling significance is the explicit statement that only the motor court exemption was under consideration. Unlike the "hotel" provisions of Section 202 (c) (1), which set forth the specific factual determinations to be made in arriving at the ultimate finding of control or decontrol, the motor-court exemption rests merely upon a simple finding as to the class of accommodations, unattended by any definitive statutory characteristics requiring the exercise of interpretative functions. This Court held that the motor-court exemption was self-executing and did not require administrative interpretation. But to avoid any assumption that the decision as thus reached properly could be applied to any other provisions of the Act, the Court noted that its prior decision in *Babcock* v. *Koepke,* 175 F. 2d 923 remained in full force. The obvious significance of the preservation of the *Babcock* v. *Koepke* decision being that another portion of Section 202 (c), relating to exemptions for accommodations not rented during a particular 24-month period, was completely unaffected, as was any other portion of section 202 (c). In short, therefore, the *Fontecchio* case, *supra,* stands as a determination of the precise point there involved,

but is not available for support in a wholly unrelated situation.

Of interest here is the manner in which the June 30, 1947, cut-off date for hotels was accepted in *Woods* v. *Benson,* 177 F. 2d 543 (C. A. 8th). The question in that case was whether all of the services specified in Section 202 (c) (1) needed to have been actually utilized or whether it was sufficient for them to have been available for use. The Court obviously assumed that the test of utilization or availability of the services related to the June 30, 1947, cut-off date, and not to any more recent period, for it quoted, and at the very least tacitly accepted the administrative interpretation, that "The test date for determining control is June 30, 1947, and the exemption becomes effective only for those accommodations eligible for decontrol on that date" (at p. 545). Throughout the *Benson* opinion are references indicating acceptance of the cut-off date: "on June 30, 1947, seven of these 190 units had received the regular maid service" (p. 545) * * *; [The Act] "had the same meaning on its effective date, July 1, 1947 (p. 547); "If, therefore, the hotel on June 30, 1947, provided linen service at an additional cost the fact that the guest on June 30, 1947, did not accept this service does not defeat control," quoting from the Expediter's interpretation (p. 546); and "Rooms in a hotel (see definition of hotel in section 1) which on June 30, 1947, were occupied by persons * * *," quoting from the Expediter's Regulation (p. 546). Clearly the Court was fully aware of the Expediter's position as

to the cut-off date and was at least in apparent agreement with it.

In *Woods* v. *Western Holding Corporation,* 173 F. 2d 655 (C. A. 8th), the same Court dealt with the question in an even more direct manner. In determining whether the premises there involved satisfied the conditions precedent to decontrol for hotels, the Court accepted the Expediter's formulation of the question as: "first, whether or not the properties were on *June 30, 1947,* commonly known as hotels in the community in which they are located, and second, whether or not these properties *on that date* provided the occupants of the housing accommodations with such customary hotel services as are habitually furnished in the community. * * *" [Emphasis supplied.] Again, the Court related the evidence to the cut-off date: "the two properties here involved, on and prior to June 30, 1947, and thereafter, were commonly known as hotels in the community * * *" (p. 656); "for many years prior to June 30, 1947, these properties were represented and held by the owner and operator as being hotels" (p. 657); "on and prior to June 30, 1947, and thereafter, the said 130 units consisted of * * *" (p. 657); "On and prior to June 30, 1947, and thereafter, all units in the two establishments were supplied with furniture * * *" (657); and, quoting the legislative history, "Based upon the intent of Congress as expressed in the legislative history of the Housing and Rent Act of 1948, the word 'hotel' as used in the Act and the Regulations is interpreted to mean those establishments which on June 30, 1947, the effective date of

the Housing and Rent Act of 1947, were commonly known as hotels in the community in which they are located * * *" (p. 660).

Appellant's citation of *Woods* v. *Kourmadas,* 180 F. 2d 255 (C. A. 6th) is of no aid to him. The Court carefully distinguished its affirmance of the factual determinations of the trial court in that case from the situation, present here, "where the change of premises was made subsequent to the effective date of the Housing and Rent Act." As is clear from the opinion, the Court found that the required characteristics for the hotel exemption had attached "many months prior to the effective date of the Housing and Rent Act of 1947" and that it was not necessary, therefore, to consider any question "as to the cut-off date, which excludes premises from the exemption from rent control within the intendment of the statute." That decision, consequently, is of no relevance here.

This brief will not be labored with lower court decisions on the cut-off date. To dispose of appellant's reference to Judge Erskine's opinion in *United States* v. *Fritz Properties, Inc.,* D. C. Cal., N. D., So. Div., No. 29079–E, March 25, 1950, the Court's opinion details at considerable length the evidence relating to the character of the premises *as of June 30, 1947,* and arrives at the finding that on *June 30, 1947,* the evidentiary factors needed for exemption were present. It would not be profitable here to discuss the factual elements involved in that case, and the legal conclusions support, rather than diminish, the force of appellee's argument.

2. The legislative history

The legislative history also fully supports appellee's position that Congress intended to confer the exemption of the Act solely upon those accommodations which constituted a hotel within the definition of Section 202 (c) on June 30, 1947. The background of the provisions in question and the legislative history relating thereto is set forth below.

Rent control over hotels, as well as other housing accommodations, was imposed early in the war period by the Emergency Price Control Act of 1942, as amended (50 U. S. C. App. 901, et seq.) and regulations thereunder.[9] The first regulatory change in the hotel regulation of interest here occurred upon the issuance on January 17, 1947, of Amendment No. 102 (12 F. R. 395) which provided for the decontrol of daily rates on rooms occupied by transient guests. This action had the practical effect of excluding from control wholly transient hotels and transient rooms in hotels which catered both to transient and permanent guests.[10] Upon enactment of the Act of 1947 on July 1, 1947, the Congress provided an exemption from rent control for all hotels satisfying specific standards. Thus, Section 202 (c) of the Act provided, in pertinent part:

[9] The Rent Regulation for Transient Hotels, Residential Hotels, Rooming Houses and Motor Courts, 8 F. R. 7334; The Rent Regulation for Housing, 8 F. R. 7322.

[10] In subsequent legislation, the Congress, as is evident from the legislative history assumed that such transient accommodations would remain free of rent control and therefore concerned itself with standards for the decontrol of hotel rooms occupied by so-called permanent guests.

(c) The term "controlled housing accommodations" means housing accommodations in any defense rental area, except that it does not include

(1) those housing accommodations, in any establishment which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid services, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; * * *.

This statutory language was in effect during the period of alleged violation in this case (September 1, 1948, to January 17, 1949). Simultaneously with this new legislative enactment, the Expediter on June 30, 1947, issued the Controlled Housing Rent Regulation (12 F. R. 4331), hereinafter called the "Regulation," which provided, in Section 1 (b) (7):

(b) *Housing to which this regulation does not apply.* This regulation does not apply to the following; * * *.

(7) *Accommodations in hotels, motor courts and tourist homes.* (i) Housing accommodations in any establishment which is commonly known as a hotel (See definition of hotel in section 1) in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; * * *

> Senator CAIN. Well, we are not in sympathy with any of that business, and we will support you gentlemen in that respect.

From the foregoing, there can be no question but that the Congress was fully informed that since July 1, 1947, the Housing Expediter had been using June 30, 1947, as the date determining whether housing accommodations could qualify for decontrol. Although the Act was extensively amended on April 1, 1948,[13] and Congress noted its dissatisfaction with the Expediter's administration of the language relating to services, the regulatory provisions and interpretation of the Expediter with respect to the cut-off date were not disturbed. (See H. Rep. No. 1611 (Conference Report), 80th Cong., 2d Sess., p. 9.)

On July 1, 1948, the Expediter published an interpretation which set forth in detail the definition of a hotel as theretofore employed by him in the day-to-day administration of the Act. This interpretation (13 F. R. 3673) provided in part:

> 1. *Meaning of the word "hotel."* Based upon the intent of Congress as expressed in the legislative history of the Housing and Rent Act of 1948, the word "hotel" as used in the act and the regulations is interpreted to mean those

[13] Hearings, Senate Banking and Currency Committee, 80th Cong., 1st Sess., January 30–February 24, 1947, 541 pages; Hearings, House Banking and Currency Committee on H. R. 2549, 80th Cong., 1st Sess., March 17–28, 1947, 608 pages; Hearings, Subcommittee on Senate Committee on Banking and Currency, Part 1, January 17–26, 1948, Part 2, January 28–February 4, 1948, on Extension of Rent Control, 80th Cong., 2d Sess., and Hearings, House Banking and Currency Committee, February 3–10, 1948, 80th Cong., 2d Sess.

establishments which on June 30, 1947, the effective date of the Housing and Rent Act of 1947, were commonly known as hotels in the community in which they were located and which provided occupants of housing accommodations therein with customary hotel services. * * *

* * * * *

3. *Test date for decontrol determination.* The test date for determining decontrol is June 30, 1947, the effective date of the Housing and Rent Act of 1947, and the exemption provided by the act and regulation is effective only for those housing accommodations meeting the requirements for decontrol on that date. If a housing accommodation meets the test as of June 30, 1947, it will not be subject to control by reason of any decreases in services after such date. If a housing accommodation does not meet the test as of June 30, 1947, it is not decontrolled even though some of the customary services which were not provided on that date were subsequently provided.

There is thus a consistent line of administrative interpretation of the provisions of Section 202 (c) of the Act and recognition and acceptance by the Congress of the administrative interpretation. However, if even the smallest doubt remains as to the validity of the Expediter's argument, in the light of the foregoing citation of legislative history and administrative action, the numerous comments made during consideration of the 1949 amendments to the Act should forcefully lay to rest any such possible

reservations. Thus, on March 10, 1949 (Cong. Rec., p. 2227), Representative Patman stated:

> Mr. PATMAN. * * *
>
> I am inserting herewith answers to questions that have been propounded to the Housing Expediter and his answers thereto:
>
> Questions and Answers on H. R. 1731 Amending the Housing and Rent Act of 1947, as Amended
>
> * * * * *
>
> 2. * * *
>
> Answer. The bill decontrols all accommodations in transient hotels and recontrols all accommodations in apartment and residential hotels. The test date for determining the status of a particular establishment is June 30, 1947.[14]

On the following day, Representative Wolcott, ranking minority member of the House Banking and Currency Committee, stated (Cong. Rec. March 11, 1949, p. 2347):

> Mr. WOLCOTT. * * *
>
> They [permanent occupancy units] will go back under control. These will be the only ones which will be controlled. So what we call the permanents in transient hotels on June 30, 1947, will go back under control regardless of whether they are now being rented to transients, regardless of whether they are or are not giving the same services to these units that they may be giving to a transient unit which is

[14] Review of the extensive debate on the bill, H. R. 1731, discloses no comment on the use of the June 30, 1947, cut-off date; only apparent knowledge and recognition of the specific insertion of that date in the initial regulation, issued July 1, 1947, is evident.

> not under control right across the hall from it. * * *

And the following statements in the House of Representatives and in the Senate bear very directly and specifically upon the point in question. In the House (Cong. Rec. March 11, 1949, p. 2347):

> Mr. BUCHANAN. *The existing law as of June 30, 1947,* decontrols transient hotels affecting permanent residents within those transient hotels. [Emphasis added.]

And in the Senate (Cong. Rec. March 21, 1949, p. 2873):

> Senator DOUGLAS. I would be perfectly willing to consider a provision to that effect that only the permanent accommodations in hotels which were so used on October 30, 1948, should be recontrolled, and *not merely those which were permanently occupied on June 30, 1947.* [Emphasis added.]

The several reports of both the House and Senate on bills then pending show full recognition and acceptance of the past use of the June 30, 1947, cut-off date. In the House, the Subcommittee on Banking and Currency stated, in its report (H. Rep. No. 215, 81st Cong., 1st Sess., p. 9):

> The first amendment would exclude from the category of controlled housing accommodations any housing accommodations which on June 30, 1947, were located in transient hotels as distinguished from apartment or residential hotels.

In the Senate, the report on H. R. 1731 contains the following statement (Sen. Rep. No. 127, 81st Cong., 1st Sess., p. 7):

> Under the committee amendments accommodations in hotels, even though provided services of the character defined, will be recontrolled unless they were used for transient occupancy on June 30, 1947.

And the Conference report to accompany H. R. 1731, which commented upon provisions shortly thereafter enacted into law, advised (Rep. No. 332, 81st Cong., 1st Sess., p. 17):

> The conference substitute makes *no change in present law* for housing accommodations in hotels in cities of less than 2,500,000 population. * * *
>
> * * * * *
>
> (2) the term "hotel" means any establishment *which on June 30, 1947,* was commonly known as a hotel * * *. [Emphasis added.]

From all of the foregoing, it would hardly seem open to serious debate that the Congress was fully aware of the Expediter's use of June 30, 1947, as the date to be used to determine the character of the housing accommodations in qualification for decontrol. This is made evident by the use of Congress itself of that date and the similar technique in the several amendments offered during consideration of rent control legislation over the past few years, the acceptance, without question, of the past use of such a rent control device, and the lack of criticism or amendment in the face of direct knowledge of that fact.[15]

[15] In fact, it is little short of amazing that during the extensive hearings on the 1948 and 1949 amendments no witness, so far as the Expediter is able to determine, even commented upon the use

As has been previously noted, it has long been recognized that Congressional reenactment of a law which has been interpreted by regulation constitutes ratification of that regulation. *Bowles* v. *Wheeler,* 152 F. 2d 34, 38 (C. A. 9th); *Woods* v. *Oak Park Chateau Corp.,* 179 F. 2d 611 (C. A. 7th).

III

Restitution is a proper remedy pursuant to Section 206 (b) of the Act

Appellant's next contention is that "only the tenant had the right to sue for overcharges[16] (Br. 10). But he does not seriously argue the point since he concludes his statement with a disavowal of any legal authority to support his claim.

> * * * True an abundance of cases will be cited by the Expediter to support his contention here. With all due respect to the judges who decided those cases I still claim that their opinions thereon were based on a "legislative mirage"—a law which didn't exist.

In any event, if appellant is arguing against the Expediter's right to seek restitution, the contention is completely opposed to the plain language of the statute, which provides, in Section 206 (b):

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of the cut-off date, even though rent control over hotels was the subject of testimony by interested parties representing the various classes of hotels.

[16] This statement is inaccurate even applied to damages. The Act of 1949 gave the Expediter the right to sue for damages. Under the doctrine of *Woods* v. *Gianoulis*, No. 10121, decided May 18, 1950, C. A. 3d (not yet reported), the Expediter has the right to sue for damages within one year of violation.

> (b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

It will thus be observed that the determination to bring suit for restitution rests entirely and exclusively upon the "judgment of the Housing Expediter" and is not within the discretion of a tenant. Unlike Section 205, not here involved, which gives a right of suit for *damages* to the tenant, Section 206 (b) has for its primary purpose the vindication of the public interest, *Woods* v. *Richman,* 174 F. 2d 614, 615–16 (C. A. 9th), and permits the Expediter to sue for restitution. As hereinafter noted, these principles are abundantly supported by judicial opinion.

The Supreme Court has held that the Administrator (Expediter) may sue for restitution pursuant to Section 205 (a) of the Emergency Price Control Act of 1942 (50 U. S. C. A. 925 (a)) (*infra,* p. 48). *Porter* v. *Warner Holding Co.,* 328 U. S. 395. This Court has followed that decision and further applied it to

Section 206 (b) of the Act of 1947 (*infra,* p. 53), which is substantially the same as the former 205 (a). (*Woods* v. *Richman,* 174 F. 2d 614 (C. A. 9); *Woods* v. *McCord,* 175 F. 2d 919 (C. A. 9); *Woods* v. *Gochnour,* 177 F. 2d 964 (C. A. 9), as did many other courts of equal eminence. *Woods* v. *Wolfe,* 182 F. 2d 516 (C. A. 3); *Woods* v. *Wayne,* 177 F. 2d 559 (C. A. 4); *Woods* v. *Witzke,* 174 F. 2d 855 (C. A. 6); *Ebeling* v. *Woods,* 175 F. 2d 242 (C. A. 8); and *Greider and Bennett* v. *Woods,* 177 F. 2d 1016 (C. A. 10)).

No useful purpose would be served in pursuing this argument further.

IV

Appellant's contention that the rents established by order of the Expediter are inequitable may not be considered by this Court where appellant has failed to exhaust prescribed administrative remedies

The appellant contends that the Court below erred in sustaining the Order of May 18, 1949, issued by the Expediter, because the rents were inequitable (Br. 11). He argues that they were not fair for two reasons: (1) The order "rolled the rentals back to April 1, 1941 * * *" (id.), and (2) "* * * that no allowance could have been made by Feeley for an unanticipated earthquake [in April, 1949]" (Br. 12). In addition, he says that even though the Court could not "determine what was fair and equitable" "* * * it could have stayed the action and allowed Feeley to apply for an increase" (Br. 12). These contentions are without merit, because (1) the appellant has not even instituted the administrative procedure

for rent adjustment, let alone exhausted it, as he must before invoking the jurisdiction of a court of equity; and (2) the facts show unequivocally that all of the rents were increased in almost every case 150% and that any failure to obtain any other benefits of the Act and Regulation is directly chargeable to appellant's negligence.

1. The appellant has failed to exhaust his administrative remedies. The appellant petitioned for a rent adjustment on January 17, 1949, and an order was issued on May 18, 1949, increasing the rents effective the date of application (Par. 5, R. 11). *This order increased the rents to the amounts set forth in said petition.* No appeal was taken from that order, although the Revised Rent Procedural Regulation No. 1 (13 F. R. 2369) provided for such appeal.

As this Court held in *La Verne Co-op Citrus Assn.* v. *United States,* 143 F. 2d 415, "The principle that administrative remedies must be exhausted before one may resort to equity is well established." See, too, *Myers* v. *Bethlehem Shipbuilding Corporation,* 303 U. S. 41; *Yakus* v. *United States,* 321 U. S. 414; *Macauley* v. *Waterman Steamship Corp.,* 327 U. S. 540, 544; *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U. S. 752. Applying the same rule to administrative orders entered pursuant to Rent Regulations under the Emergency Price Control Act of 1942, as amended, and the Housing and Rent Act of 1947 are the recent decisions of this Court in *Woods* v. *Kaye,* 175 F. 2d 886 and *Babcock* v. *Koepke,* 175 F. 2d 923. See, too, *Smith* v. *Duldner,* 175 F. 2d 629 (C. A. 6th); *Gates* v. *Woods,* 169 F. 2d 440 (C. A. 4); *Koster* v.

Turchi, 173 F. 2d 605, 608 (C. A. 3); *Woods* v. *Durr,* 176 F. 2d 273 (C. A. 3rd).

In *Woods* v. *Kaye, supra,* the Area Rent Director issued an order pursuant to Section 4 (e) of the 1942 Regulation decreasing the rent of a housing accommodation from the first rental of $150.00 per month. The landlord having failed to register the accommodations within the time required by Section 3 of the same Regulation, the order was made retroactive from the date when the house was first rented, and the excess rent collected was ordered refunded to the tenant. In an action by the Housing Expediter under Section 205 (a) of the 1942 Act, to compel restitution, the defendant challenged the retroactive aspect of the order and the trial court found the order to be invalid. In reversing such judgment, this Court said, at p. 889:

> The administrative findings of fact underlying the retroactivity of the order are to be viewed in no different light than those upon which the maximum rent figure of $75 per month was based, and we cannot conceive of the sufficiency of those facts being tested in the District Court. It would thus seem clear, in this situation, that the District Court is bound by these findings. The failure of the landlord to properly follow the procedure of review provided, results in a bar to contesting the enforcement action in the District Court.

While the review procedure considered in the *Kaye* case involved the sole jurisdiction of the Emergency Court of Appeals to review the order there involved, in *Babcock* v. *Koepke, supra,* this Court applied the rule requiring exhaustion of administrative remedies

to the procedure for review of orders of an Area Rent Director as provided by Revised Rent Procedural Regulation 1 issued by the Housing Expediter pursuant to Section 204 (d) of the 1947 Act. In the cited decision, an action was sought to be maintained by plaintiff against Koepke, individually and as Rent Director of the Los Angeles Defense-Rental Area, seeking a declaratory judgment that certain premises owned by plaintiff were not subject to control under the 1947 Act. After considering the applicable sections of the Regulation and the reason advanced by plaintiff for not following the administrative procedure there provided, the Court went on to say, at p. 924:

> We think, however, that appellant could have presented his contention of noncontrol under the section cited supra [840.11] and that he failed to exhaust his administrative remedy by not so acting. If he there had prevailed, there would be no occasion to invoke the challenged provisions of 840.11.

Moreover, none of the extenuating circumstances of those cases are present here. The appellant in this case has not as yet *applied* for an adjustment based upon Section 5 (a) 18 of the Regulations (*infra,* p. 58) for a fair net operating income. As the Supreme Court said in the *Waterman Steamship Corp.* case, *supra,* "Here, just as in the *Myers* case, the administrative process, far from being exhausted, had hardly begun" (327 U. S. at 545). In this case, the Court may truly say "has not begun."

In *La Verne Co-op Citrus Assn.* v. *United States,* 143 F. 2d 415, this Court determined that the rule as to exhaustion of administrative remedies applies equally where the validity of an administrative order is challenged by way of defense to its enforcement as well as in cases where invalidity of the order is sought by affirmative relief. As the Court there said (143 F. 2d pp. 419, 420):

> A study of relevant decisions leaves no doubt that an equity court has no jurisdiction to examine the validity of an administrative order where the administrative remedy has not been invoked or has not been completed and where the one harmed by the administrative order is the moving party in the equity action. * * *
>
> The question then arises whether the administrative remedy rule applies where the one harmed by the administrative order is the defending party in the equity action. The doctrines of primary jurisdiction and of administrative finality are equally persuasive where the issue is raised by defending parties as where it is raised by moving parties. A consideration of the defense in an enforcement action would nullify the uniformity achieved by devising a single procedure for testing orders promulgated in accordance with the terms of the act.

To the same effect as the cited decision are *Yakus* v. *United States, supra,* 321 U. S., pp. 414, 434, 435; *United States* v. *Ruzicka,* 329 U. S. 287, pp. 293–294; *Woods* v. *Durr,* 176 F. 2d 273 (C. A. 3d).

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Until the appellant here has applied for a fair net operating income, and has appealed to the Expediter, he may not come into equity and claim that his rents are not "fair and equitable."

2. The facts in this case fail to support appellant's claim of unfair treatment. He applied for an increase in rents, based upon his improvements, on January 17, 1949 (Par. 5, R. 11). The increase was granted on May 18, 1949, effective January 17, 1949, in the same amounts as applied for. On April 1, 1949, the Congress provided for a fair net operating income to landlords (Sec. 204 (b) (1), *infra,* p. 52). on May 1, 1949, the Expediter issued a regulation providing for a fair net operating income and establishing a formula to attain it (Amendment 92 (14 F. R. 2233)).

The appellant failed to avail himself of his legal remedies by (1) failing to appeal from the order of May 18, 1949; (2) failing to include all items of costs and neglecting to include all pertinent information in his application for an increase[17] (R. 28); and (3) failing to apply for a fair net operating income as provided in Section 5 (a) 18 of the Regulation.

The rents on appellant's property are, therefore, either not inequitable, or the inequities can be corrected, at a time when appellant chooses to avail himself of the existing laws.

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[17] This argument is taken from the affidavit of appellant's employee at its face value. Nothing in the record suggests that it is correct.

CONCLUSION

It is respectfully submitted that the judgment of the Court below is correct and should be affirmed.

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APPENDIX

1. Emergency Price Control Act of 1942, as amended (50 U. S. C. App. 925 (a))

SEC. 205. (a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of section 4 of this Act, he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

2. The Housing and Rent Act of 1947, as amended. Public Laws 129 (Housing and Rent Act of 1947), 422 and 464 (Housing and Rent Act of 1948), 80th Congress, and Public Law 31 (Housing and Rent Act of 1949), 81st Congress (50 U. S. C. App. Sec. 1881 et seq.)

SEC. 202. As used in this title—

(c) The term "controlled housing accommodations" means housing accommodations in any defense-rental area, except that it does not include—

(1) [1] (A) those housing accommodations, in any establishment which is located in a city of less than two

[1] This subsection was amended by Section 201 (a), Public Law 31, 81st Congress, to read as provided above. The original subsection read as follows:

"SEC. 202 (c) (1) those housing accommodations, in any establishment which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are pro-

million five hundred thousand population according to the 1940 decennial census and which is commonly known as a hotel in the community in which it is located, which are occupied by persons who are provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; or

(B) those housing accommodations in hotels in cities of two million five hundred thousand population or more according to the 1940 decennial census (i) which are located in hotels in which 75 per centum or more of the occupied housing accommodations on March 1, 1949, were used for transient occupancy, or (ii) which are not located in hotels described in (i) but which on March 1, 1949, were used for transient occupancy; for the purposes of this subparagraph (B)—

(1) the term "used for transient occupancy" means rented on a daily basis, to a tenant who had not on March 1, 1949, continuously resided in the hotel for ninety days or more; and

(2) the term "hotel" means any establishment which on June 30, 1947, was commonly known as a hotel in the community in which it is located and was occupied by an appreciable number of persons who were provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; or

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vided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy service; or"

(2) [2] any motor court, or any part thereof; any trailer, or trailer space, used exclusively for transient occupancy or any part thereof; or any tourist home serving transient guests exclusively, or any part thereof; or

(3) [3] any housing accommodations (A) the construction of which was completed on or after Febru-

[2] This subsection was amended by section 201 (b), Public Law 31, 81st Congress, to read as provided above. Prior to such amendment and as amended by section 201, Public Law 464, 80th Congress, the subsection read as follows:

"SEC. 202 (c) (2) any motor court, or any part thereof; any trailer or trailer space, or any part thereof; or any tourist home serving transient guests exclusively, or any part thereof; or"

The original subsection read as follows: "Sec. 202 (c) (2) any motor court, or any part thereof; or any tourist home serving transient guests exclusively, or any part thereof; or"

[3] This subsection was amended by section 201 (c), Public Law 31, 81st Congress, to read as provided above. Prior to such amendment and as amended by section 201, Public Law 464, 80th Congress, the subsection read as follows:

"SEC. 202 (c) (3) any housing accommodations (A) the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall remain in full force and effect; or (B) which for any successive twenty-four month period during the period February 1, 1945, to the date of enactment of the Housing and Rent Act of 1948, both dates inclusive, were not rented (other than to members of the immediate family of the landlord) as housing accommodations; or (C) the construction of which was completed on or after February 1, 1945, and prior to February 1, 1947, and which between the date of completion and June 30, 1947, both dates inclusive, at no time were rented (other than to members of the immediate family of the landlord) as housing accommodations; or"

The original subsection read as follows: "SEC. 202 (c) (3) any housing accommodations (A) the construction of which was com-

ary 1, 1947, or which are housing accommodations created by a change from a nonhousing to a housing use on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947: *Provided, however,* That any housing accommodations resulting from any conversion created on or after the effective date of the Housing and Rent Act of 1949 shall continue to be controlled housing accommodations unless the Housing Expediter issues an order decontrolling them, which he shall issue if he finds that the conversion resulted in additional, self-contained family units as defined by regulations issued by him: *And provided further,* That contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall remain in full force and effect; or (B) the construction of which was completed on or after February 1, 1945, and prior to February 1, 1947, and which between the date of completion and June 30, 1947, both dates inclusive, at no time were rented (other than to members of the immediate family of the landlord) as housing accommodations; or

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pleted on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall remain in full force and effect, or (B) which at no time during the period February 1, 1945, to January 31, 1947, both dates inclusive, were rented (other than to members of the immediate family of the occupant) as housing accommodations."

The Housing and Rent Act of 1947, as amended
Section 204 (b) (1)

(b) (1) Subject to the provisions of paragraphs (2) and (3) of this subsection, and subsections (h) and (i), during the period beginning on the effective date of this title and ending on the date this title ceases to be in effect, no person shall demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations greater than the maximum rent established under the authority of the Emergency Price Control Act of 1942, as amended, and in effect with respect thereto on June 30, 1947: *Provided, however,* That the Housing Expediter shall, by regulation or order, make such individual and general adjustments in such maximum rents in any defense-rental area or any portion thereof, or with respect to any housing accommodations or any class of housing accommodations within any such area or any portion thereof, as may be necessary to remove hardships or to correct other inequities, or further to carry out the purposes and provisions of this title: *Provided, however,* That the landlord certifies that he is maintaining all services furnished as of the date determining the maximum rent and that he will continue to maintain such services so long as the adjustment in such maximum rent which may be granted continues in effect. In making and recommending individual and general adjustments to remove hardships or to correct other inequities, the Housing Expediter and the local boards shall observe the principle of maintaining maximum rents for controlled housing accommodations, so far as is practicable, at levels which will yield to landlords a fair net operating income from such housing accommodations. In determining whether the maximum rent for controlled housing ac-

commodations yields a fair net operating income from such housing accommodations, due consideration shall be given to the following, among other relevant factors: (A) Increases in property taxes; (B) unavoidable increases in operating and maintenance expenses; (C) major capital improvement of the housing accommodations as distinguished from ordinary repair, replacement, and maintenance; (D) increases or decreases in living space, services, furniture, furnishings, or equipment; and (E) substantial deterioration of the housing accommodations, other than ordinary wear and tear, or failure to perform ordinary repair, replacement, or maintenance.

Section 206 (b)

(b) [5] Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage

[5] This section was amended by section 205, Public Law 31, 81st Congress, to read as provided above. Prior to such amendment and as amended by section 203, Public Law 464, 80th Congress, this section read as follows:

(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice which constitutes or will constitute a violation of any provision of this title, he may make application to any Federal, State, or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such provision, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

The original section read as follows:

"Sec. 206. (a) It shall be unlawful for any person to offer, solicit, demand, accept, or receive any rent for the use or occupancy of any controlled housing accommodations in excess of the maximum rent prescribed under section 204.

"(b) Whenever in the judgment of the Housing Expediter any person has engaged or is about to engage in any act or practice

in any acts or practices which constitute or will constitute a violation of any provision of this Act, or any regulation or order issued thereunder, the United States may make application to any Federal, State, or Territorial court of competent jurisdiction for an order enjoining such acts or practices for an order enforcing compliance with such provision, and upon a showing that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order shall be granted without bond.

3. Controlled housing rent regulation

(12 Federal Register 4331)

SECTION 1:

(b) *Housing to which this regulation does not apply.* This regulation does not apply to the following:

(8) *Accommodations first offered for rent.* (i) Housing accommodations, the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947, except that contracts for the rental of housing accommodations to veterans of World War II and their immediate families, the construction of which was assisted by allocations or priorities under Public Law 388, Seventy-ninth Congress, approved May 22, 1946, shall

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which constitutes or will constitute a violation of subsection (a) of this section, he may make application to any Federal, State or Territorial court of competent jurisdiction, for an order enjoining such act or practice, or for an order enforcing compliance with such subsection, and upon a showing by the Housing Expediter that such person has engaged or is about to engage in any such act or practice a permanent or temporary injunction, restraining order, or other order shall be granted without bond."

remain in full force and effect; (ii) Housing accommodations which at no time during the period February 1, 1945 to January 31, 1947, both dates inclusive, were rented (other than to members of the immediate family of the occupant) as housing accommodations: *Provided, however,* That all housing accommodations referred to in this paragraph (8) shall be subject to this regulation unless the landlord files in the area rent office a report of decontrol on a form provided by the Expediter within 30 days after July 1, 1947, or within 30 days after the date of first renting, whichever is the later: and *Provided further,* That if a landlord fails to file said report of decontrol within the applicable specified period, such housing accommodations shall be and remain subject to the provisions of this regulation until the date on which he files said report.

For the purposes of this paragraph (8) the construction of housing accommodations is considered completed on the date the last material, fixture or equipment is incorporated into the structure provided the dwelling is suitable for occupancy at that time.

For the purposes of this paragraph (8) the word "conversion" means (1) a change in a structure from a non-housing use or (2) a structural change in a residential unit or units involving substantial alterations or remodeling and resulting in the creation of additional housing accommodations.

Section 1 (b)

(Amended by amendment 27, 13 Federal Register 1861, effective April 1, 1948)

(2) *Decontrolled housing to which this regulation does not apply.* This regulation does not apply to the following:

(i) *Accommodations in hotels, motor courts, trailers and trailer spaces, and tourist homes.* (*a*) Housing accommodations in a hotel (see definition of hotel in section 1) which on June 30, 1947, were occupied by persons to whom were provided customary hotel services such as maid service, furnishing and laundering of linen, telephone and secretarial or desk service, use and upkeep of furniture and fixtures, and bellboy services (not necessarily all the types of services named need be provided in all cases, as long as enough are provided to constitute customary hotel services usually supplied in establishments commonly known as hotels in the community where they are located); (*b*) housing accommodations in establishments which were motor courts on June 30, 1947; (*c*) housing accommodations located in trailers and ground space rented for trailers; and (*d*) housing accommodations in any tourist home serving transient guests exclusively on June 30, 1947.

(ii) *Accommodations created by new construction or conversion.* (*a*) Housing accommodations the construction of which was completed on or after February 1, 1947, or which are additional housing accommodations created by conversion on or after February 1, 1947: *Provided, however,* That maximum rents established under the Veterans' Emergency Housing Act for priority constructed housing accommodations completed on or after February 1, 1947, shall continue in full force and effect if such accommodations are being rented to veterans of World War II or their immediate families who, on June 30, 1947, either (1) occupied such housing accommodations, or (2) had a right to occupy such housing accommodations at any time on or after July 1, 1947, under any agreement whether written or oral; (*b*) housing accommo-

dations the construction of which was completed on or after February 1, 1945, and prior to February 1, 1947, and which between the date of completion and June 30, 1947, both dates inclusive, at no time were rented (other than to members of the immediate family of the landlord) as housing accommodations.

For the purposes of this paragraph (ii) the time at which construction of housing accommodations shall be deemed to be "completed" shall be the date on which the dwelling is first suitable for occupancy and all utility and service connections have been made, except for the installation of such items and the completion of such decoration work as, in accordance with the custom of the community, are left for installation by, or to the choice of, the purchaser or the tenant; and the word "conversion" means (1) a change in a structure from a nonhousing to a housing use or (2) a structural change in a residential unit or units involving substantial alterations, or remodeling and resulting in the creation of additional housing accommodations.

Section 5:

(a) *Grounds for increase of maximum rent.* Any landlord may file a petition for adjustment to increase the maximum rent otherwise allowable only on the grounds that:

(1) *Major capital improvement after effective date.* There has been on or after the effective date of the Rent Regulation for Housing, issued pursuant to the Emergency Price Control Act of 1942, as amended, a substantial change in the housing accommodations by a major capital improvement as distinguished from ordinary repair, replacement, and maintenance.

(14 Federal Register, 2233)

[Controlled Housing Rent Reg., Amdt. 92]

Part 825—Rent Regulations Under the Housing and Rent Act of 1947 as Amended

CONTROLLED HOUSING RENT REGULATION

* * * * * * *

(18) *Housing accommodations not yielding fair net operating income*—(ii) *Grounds.* The net operating income from the building is less than a fair net operating income: *Provided, however,* That no adjustment shall be granted under this paragraph (a) (18) with respect to housing accommodations regularly rented to employees of the landlord (so-called company housing). A petition for adjustment under this paragraph (a) (18) must be filed on Form D–106, provided by the Expediter, in accordance with instructions contained therein.

The net operating income from a building shall be considered to be less than a fair net operating income if such net operating income is less than 25 percent of the annual income in the case of a building containing less than five dwelling units, or is less than 20 percent in the case of a building containing five or more dwelling units.

(ii) *Amount of adjustment.* The adjustment under this paragraph (a) (18) shall be in such amount as is necessary to bring the net operating income from the building (expressed as a percentage of annual income) to the median net operating income of landlords generally. This median is 30 percent of annual income in the case of buildings containing less than five dwelling units, and 25 percent in the case of buildings containing five or more dwelling units.

(iii) *Successive petitions.* Where an adjustment is granted under this paragraph (a) (18) and a subsequent petition is filed thereunder, the test year used in any such subsequent petition shall begin after the end of the test year used in the last previous petition: *Provided, however,* That the Expediter may waive this limitation where the building has been affected by a significant increase in operating expenses which applied to all or an important class of housing accommodations in the community (such as a significant increase in property taxes or a significant increase in contract wages).

4. Interpretation

(13 Federal Register 5001, 5002)

PART 825—RENT REGULATIONS UNDER THE HOUSING AND RENT ACT OF 1947, AS AMENDED

DECONTROL OF CERTAIN CLASSES OF HOUSING ACCOMMODATIONS

The following is an interpretation of those provisions of the Rent Regulations and of the Housing and Rent Act of 1947, as amended, which provide for decontrol of the classes of housing accommodations listed below. The rent regulation provisions interpreted herein are contained in section 1 (b) (2) of the Controlled Housing Rent Regulations, as amended (§§ 825.1, 825.2, 825.3, 825.4) and of the Rent Regulations for Controlled Rooms in Rooming Houses and Other Establishments, as amended (§§ 825.5, 825.6, 825.7). The provisions of the Housing and Rent Act of 1947, as amended, which are interpreted herein are sections 202 (c) (2), 202 (c) (3) and 202 (c) (4). The classes of housing accommodations covered by this interpretation are the following:

I. Tourist homes.

II. Motor courts.

III. Trailers and ground space rented for trailers.

IV. Newly constructed housing accommodations completed on or after February 1, 1947.

V. Additional housing accommodations created by conversion on or after February 1, 1947.

VI. Housing accommodations not rented for any successive 24-month period between February 1, 1945, and March 30, 1948.

VII. Newly constructed housing accommodations completed between February 1, 1945, and January 31, 1947, and not rented until after June 30, 1947.

VIII. Non-housekeeping furnished accommodations located in a single dwelling unit.

I. *Tourist homes*—1. *Provision of regulations.* Section 1 (b) (2) of the regulations provides for decontrol of housing accommodations in any tourist home serving transient guests exclusively on June 30, 1947. A decontrol provision on tourist homes has been included in the regulations since July 1, 1947, based upon section 202 (c) (2) of the Housing and Rent Act of 1947 which became effective on that date. The act as amended April 1, 1948, made no change in this provision.

2. *Test date for decontrol; June 30, 1947.* The test date for decontrol of housing accommodations in tourist homes is and has been June 30, 1947. If on June 30, 1947, an establishment was a tourist home and served transient guests exclusively, all housing accommodations in that establishment are decontrolled, and this decontrol continues regardless of any change in facts or rental practices since June 30, 1947. Likewise, if on June 30, 1947, an establishment failed to meet the definition of a tourist home,

or was a tourist home which did not rent to transient guests exclusively, then the housing accommodations in that establishment are not decontrolled under the "tourist home" decontrol provision, and no subsequent change in facts or rental practices would cause them to become decontrolled by virtue of that provision.

3. *Partial decontrol.* There is no partial decontrol in the case of tourist homes. In order for any of the housing accommodations in a tourist home to be decontrolled, all the housing accommodations in the tourist home which were available for rent on June 30, 1947, must have been rented or offered for rent to transient guests on that date. For example, if only one of all the rooms was rented to a permanent guest on June 30, 1947, all the rooms in that tourist home are controlled housing accommodations.

This does not necessarily mean that there can be no decontrol where a tourist home was operated in only part of an entire structure. For example, where there was a two-family house, of which one dwelling unit was rented on a permanent basis and the other was operated as a tourist home, the latter unit comprised the tourist home. In such case, if all the accommodations in the tourist home unit which were available for rent on June 30, 1947, were rented or offered for rent to transient guests on that date, all such accommodations are decontrolled.

4. *Exemption of daily rates under old hotel regulation.* Section 4 (h) of the Rooming House Regulations continues in effect all exemptions of daily rates in tourist homes which were established under section 4 (k) of the "hotel regulation" issued pursuant to the Emergency Price Control Act of 1942, as amended.

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II. *Motor courts*—1. *Provision of regulations.* Section 1 (b) (2) of the Regulations provides for decontrol of housing accommodations in establishments which were motor courts on June 30, 1947. A decontrol provision on motor courts has been included in the regulations since July 1, 1947, based upon section 202 (c) (2) of the Housing and Rent Act of 1947 which became effective on that date. The act as amended April 1, 1948, made no change in this provision.

2. *Test date for decontrol; June 30, 1947.* The test date for decontrol of housing accommodations in motor courts is and has been June 30, 1947. If on June 30, 1947, an establishment was a motor court, all the accommodations in the establishment are decontrolled, and this decontrol continues regardless of any change in facts or rental practices since June 30, 1947. Likewise, if on June 30, 1947, an establishment fails to meet the definition of a motor court, then the housing accommodations in that establishment are not decontrolled under the "motor court" decontrol provision and no subsequent change in facts or rental practices would cause them to become decontrolled by virtue of that provision.

3. *Partial decontrol.* There is no partial decontrol in the case of motor courts. If an establishment was a motor court on June 30, 1947, all the housing accommodations in that establishment are decontrolled, including trailers and trailer spaces which were attached to and operated as part of the motor court.

III. *Trailers and ground space rented for trailers.*—1. *Provision of regulations.* Section 1 (b) (2) of the regulations provides for decontrol of housing accommodations located in trailers and ground space rented for trailers.

This decontrol provision first became effective on January 5, 1948, when it was added by amendment of the regulations. The Housing and Rent Act of 1947 did not provide for decontrol of trailers and trailer spaces. However, the act as amended April 1, 1948, changed section 202 (c) (2) of the act to provide for decontrol of any trailer or trailer space, thus confirming the action previously taken by amendment of the regulations on January 5, 1948.

2. *Trailers operated as part of motor court.* Even prior to January 5, 1948, when trailers and trailer spaces as such were still under control, it had been held by interpretation that trailers and trailer spaces were decontrolled if they were attached to and operated as part of a motor court.

IV. *Newly constructed housing accommodations completed on or after February 1, 1947*—1. *Provision of regulations.* Section 1 (b) (2) of the regulations provides for decontrol of housing accommodations, the construction of which was completed on or after February 1, 1947. This decontrol provision, however, does not apply to maximum rents established under the Veterans Emergency Housing Act of 1946 for priority constructed housing accommodations if, and only during such time as, they are being rented to veterans of World War II or their immediate families who either:

a. Occupied such housing accommodations on June 30, 1947, or

b. Had a right on June 30, 1947, under a written or oral agreement to occupy such housing accommodations at any time on or after July 1, 1947.

Such a decontrol provision has been included in the Regulations since July 1, 1947, based upon section 202 (c) (3) of the Housing and Rent Act of 1947

which became effective on that date. The act as amended April 1, 1948, made no change in this provision.

2. *Definition of when construction is "completed".* The regulations provide that for purposes of this provision, construction is deemed to be "completed" when the dwelling is first suitable for occupancy and all services and utility connections have been made, except for the installation of such items and the completion of such decoration work as, in accordance with the custom of the community, are left for installation by or to the choice of the purchaser or tenant.

3. *Repair or rehabilitation of damaged structures.* Where a structure which has been damaged by fire or otherwise is repaired or rehabilitated on or after February 1, 1947, a question of fact is presented as to whether new housing accommodations have been created by construction (in which event they would be decontrolled), or whether the previously existing housing accommodations have merely been repaired or rehabilitated (in which event they would not be decontrolled). Of course there may be cases in which some units in a structure are newly constructed, while other units in the same structure are merely repaired or rehabilitated. In such cases, the newly constructed units are decontrolled, while the other units remain under control.

The mere fact that the damage was so extensive as to render housing accommodations uninhabitable, forcing tenants to vacate, does not necessarily establish that the units, after completion of the repair or rehabilitation work, are eligible for decontrol.

V. *Additional housing accommodations created by conversion on or after February 1, 1947*—1, *Pro-*

vision of regulations. Section 1 (b) (2) of the regulations provides for decontrol of additional housing accommodations created by conversion on or after February 1, 1947. This decontrol provision, however, does not apply to maximum rents for priority constructed housing under the conditions stated in IV, 1 above.

Such a decontrol provision has been included in the Regulations since July 1, 1947, based upon section 202 (c) (3) of the Housing and Rent Act of 1947 which became effective on that date. The act as amended April 1, 1948, made no change in this provision.

2. *Definition of "Conversion".* The regulations provide that for purposes of this provision the word "conversion" means (1) a change in a structure from a non-housing to a housing use, or (2) a structural change in a residential unit or units involving substantial alterations or remodeling and resulting in the creation of additional housing accommodations.

3. "Completion" of construction not an element in conversion cases. It should be noted that, whereas newly constructed housing accommodations are decontrolled if construction was "completed" on or after February 1, 1947, decontrol in the case of a conversion occurs only if additional housing accommodations were created by the conversion on or after that date. There is a substantial difference between these two concepts. For example, where the conversion resulted in additional housing accommodations which were occupied prior to February 1, 1947, they would not be decontrolled even though additional work was done on or after that date. The test is not whether the additional housing accommodations were "completed" prior to February 1, 1947, but whether they were

created prior to that date.

4. *Requirement of structural change involving substantial work.* In order for decontrol to occur by reason of conversion of previously existing housing accommodations, there must be a structural change involving substantial alterations or remodeling. For example, if a single family residence is divided into two units merely by a locking of doors and renting to two separate tenants, decontrol does not result.

5. *Requirement that additional housing accommodations result from the alterations or remodeling.* Where there has been a structural change involving substantial alteration or remodeling, decontrol occurs only if additional housing accommodations result from this work. This determination is made with respect to the dwelling unit or dwelling units which are necessarily involved in the creation of additional housing accommodations.

> *Examples:* A vacant structure contains two 6-room apartments, each containing a kitchen and a bathroom. Subsequent to February 1, 1947, the landlord made structural changes in one apartment involving substantial alterations and remodeling. He converts the apartment into two apartments by adding a kitchen and a bath to two of the rooms and separating this apartment from the remaining four rooms (including kitchen) and bath. The other 6-room apartment was not involved in the conversion. The 4- and 3-room apartments are considered additional housing accommodations created by conversion and decontrolled, while the 6-room apartment remains under control.

6. *Basis for determining whether additional housing accommodations have been created.* In determining whether additional housing accommodations have

been created, the primary test is not whether there are more tenants in occupancy than before the conversion, nor whether there is more floor space. The determination is made by comparing the number of dwelling units before and after the conversion. For example: There was a 12-room vacant house which was structurally designed for single family occupancy, but which was occupied by the owner and six roomers. Subsequent to February 1, 1947, this house was converted into four individual apartments, each with its own kitchen and bath facilities. All four apartments are decontrolled.

> NOTE: In the cases cited in paragraphs 5 and 6 above, the conversion took place when the accommodations were vacant. Different considerations are involved in cases where the conversion takes place while a tenant remains in occupancy. Such exceptional cases require individual treatment and are not discussed in this interpretation.

VI. *Housing accommodations not rented for any successive twenty-four month period between February 1, 1945, and March 30, 1948*—1. *Provision of regulations.* Section 1 (b) (2) (iii) of the regulations provides for decontrol of housing accommodations which were not rented as such for any successive 24-month period between February 1, 1945, and March 30, 1948 (both dates inclusive), other than to members of the landlord's immediate family.

The Housing and Rent Act of 1947, effective July 1, 1947, contained a decontrol provision which was the same as the present one, except that it covered only housing accommodations which were not rented at any time between February 1, 1945, and January 31, 1947, other than to members of the immediate family of the occupant. The act as amended to April 1, 1948, ex-

tended this decontrol provision to cover housing accommodations which were not rented during any successive 24-month period between February 1, 1945, and March 30, 1948, other than to members of the landlord's immediate family.

2. *Removal of house to new location.* If housing accommodations were rented during the two-year period, and were physically moved to a new location after expiration of the two-year period, they are not decontrolled. The removal of a house to a new location does not change the fact that the particular house had been rented during the two-year period. Of course, a new maximum rent should be established under section 4 (c) of the regulations, by reason of the new location, which would be subject to reduction on the basis of comparability.

3. *Rental of only part of house during two-year period.* Where only part of a house was rented during the two-year period and the portion that was rented constituted less than a predominant part of the entire house (predominance being determined on a space basis), the portion that was rented is not decontrolled. However, if the entire house is subsequently rented, as one unit, it is decontrolled and likewise the rental of any portion of the house which was not rented during the two-year period is also decontrolled.

Where only a part of a house was rented during the two-year period, and the portion that was rented constituted the predominant part of the entire house, there is no decontrol of either the entire house or of any portion that was rented during the two-year period.

4. *Rental of entire house or structure as such during two-year period.* Where, during the two-year period, an entire house was rented to a tenant as a

residence, there is no decontrol either on a rental of the entire house or on a separate renting of any portion of the house. This is because the entire house, including every portion thereof, was rented during the two-year period.

Where, during the two-year period, an apartment structure was rented as such to a master tenant who occupied one of the apartments himself and sublet the other apartments to tenants, the apartment occupied by the master tenant as well as the other apartments, are not decontrolled. This is because the apartment occupied by the master tenant was rented during the two-year period as part of the underlying lease of the entire structure. The other apartments, of course, was rented both as part of the underlying lease and separately by the master tenant.

5. *Occupancy by landlord as condition for decontrol.* Under the Housing and Rent Act of 1947 and the regulations in effect prior to April 1, 1948, where entire housing accommodations were rented during the two-year period to members of the landlord's immediate family, there was no decontrol. This is because the landlord was not an "occupant" of the housing accommodations in question, and the 1947 act and regulations provided for decontrol in such cases only if the renting was to members of the immediate family of the "occupant." This does not apply on and after April 1, 1948, because the act and regulations as amended April 1, 1948, provide for decontrol in such cases if the housing accommodations were rented to members of the immediate family of the "landlord." Occupancy by the landlord of part of the housing accommodations is no longer required as a condition of decontrol.

6. *Occupancy by tenants in common during two-year period.* In any case where during the two-year

period housing accommodations were owned by two or more individuals as tenants in common, and were occupied during that period by one or more of those individuals by virtue of their status as tenants in common, the housing accommodations are decontrolled. In other words, the relationship between tenants in common is not a landlord-tenant relationship, so that in such cases the housing accommodations have not been "rented."

7. *Occupancy by seller as part of purchase contract during two-year period.* Where a purchaser of housing accommodations, as part of a purchase contract, permits the seller to remain in possession for a limited period of time, this constitutes a "renting." Where, however, the local courts have ruled that this type of occupancy does not involve a landlord-tenant relationship, and the parties acted in reliance upon the decision of the court, the question of decontrol of the particular housing accommodations is left for decision by the local courts.

8. *Occupancy during two-year period by sole stockholder of corporation.* Where during the two-year period there was occupancy by the sole stockholder of a corporation which was the owner of the house, a question is presented as to whether there was a landlord-tenant relationship between the corporation and the sole stockholder. Ordinarily, since a corporation is a legal entity separate from its stockholders, occupancy by the sole stockholder would be on the basis of a landlord-tenant relationship, so that the housing accommodations would not be decontrolled.

9. *Housing accommodations which were exempt from rent control during two-year period.* Where during the two-year period housing accommodations were rented under circumstances which caused the renting to be exempt from the rent regulations, the

mere fact that such an exemption existed does not result in decontrol. For example, where housing accommodations were occupied during the two-year period by a janitor as part of the compensation he received for his services as janitor, the housing accommodations, so long as this situation existed, were exempt from the rent regulations. If, however, after expiration of the two-year period, the housing accommodations are no longer occupied by a janitor under such an arrangement, but are rented to a tenant under an ordinary rental agreement, the exemption ceases to apply, and the question arises whether they are decontrolled on the basis that they had not been "rented" during the two-year period. Such housing accommodations are not decontrolled on that basis because, even though they were exempt during the two-year period, they were rented during that period to a person who was not a member of the landlord's immediate family.

Another example of the same principle is the following: A college dormitory was occupied by students during the two-year period under circumstances which made rooms exempt from rent control. After the two-year period, the college proposes to rent the rooms in the structure to professors or other persons on an ordinary landlord-tenant basis. Such a renting would be subject to rent control because, although the rooms in the dormitory were exempt during the two-year period, they were in fact rented to persons other than members of the landlord's immediate family.

5. Unreported opinions

United States District Court for the Northern District of New York

Civil Action, File No. 3173

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, PLAINTIFF

v.

STELLA RETTAS AND GEORGE RETTAS, DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having duly come on for trial before this Court without a jury on February 24, 1949, plaintiff having appeared by Sylvan D. Freeman, J. S. Brounstein, of counsel; and defendant having appeared by Spira & Hershkowitz, Max H. Hershkowitz, of counsel, and after hearing testimony of witnesses and argument of counsel, and upon all the pleadings and proceedings in the cause and full consideration thereof, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff is the duly appointed Housing Expediter, Office of the Housing Expediter.

2. Defendants, George and Stella Rettas, at all times pertinent hereto were landlords and operators of housing accommodations located at premises 1122–24 Sixth Avenue, Schenectady, New York.

3. That the 2nd floor apartment at said premises, was at all times pertinent hereto, subject to the Housing & Rent Act of 1947, as amended and the Controlled Housing Regulation issued thereunder.

4. Prior to March 18, 1948, the maximum legal rent for the 2nd floor apartment was $25.00 per month,

as indicated in a registration statement filed in the Area Rent Office.

5. In about November 1947, defendants converted the premises from a 2 family to a 3 family house, completely modernized the 2nd floor apartment by the installation of new plumbing, fixtures, and cabinets. In the course of such alteration, a stairway leading to the 3rd floor attic was enlarged for access thereto and a new apartment was created on the 3rd floor.

6. Defendants' application to the Office of the Housing Expediter for an increase in the maximum legal rent of the 2nd floor apartment resulted in an order permitting an increase to $70.00, including heating fuel, per month, effective March 18, 1948.

7. Stephen Jason was a tenant occupying the 2nd floor apartment from December 7, 1947, to March 15, 1948, and paid the defendants the sum of $25.00 per week during that period except that no rent was paid for the last 3 weeks thereof.

8. Tenant Roy E. Burris, Jr., occupied the 2nd floor apartment from April 1, 1948, to November 30, 1948, and paid the defendants $80.00 per month for that period plus a total of $57.88 for fuel oil.

9. Section 202 (c) (3) of the Housing & Rent Act of 1947 and Section 1 (b) (2) of the Regulation provide that additional housing accommodations created by conversion on or after February 1, 1947, may be decontrolled.

10. An official interpretation of these sections issued by Ed Dupree, General Counsel of the Office of the Housing Expediter on August 25, 1948, and published in the Federal Register holds that the decontrol determination is made with respect to the dwelling units which are necessarily involved in the creation of additional housing accommodations.

11. The 2nd floor apartment is not "additional

housing accommodations created by conversion'' as contemplated by the Act and Regulation thereunder.

12. Since the two tenants involved had the benefit of the modernization, on which the March 18, 1948, order of the Area Rent Director, increasing the maximum legal rent to $70.00, was based, equity requires that that rental be used as the basis for computing overcharges.

13. The tenant Stephen Jason has been overcharged the sum of $18.66.

14. The tenant Roy E. Burris has been overcharged the sum of $137.88.

15. The defendants have charged rentals in excess of the legal maximum rent and because of this claim that the 2nd floor apartment is decontrolled, will continue to so overcharge unless restrained.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and subject matter of this action.

2. The 2nd floor apartment of the premises is not removed from rent control by the provisions of Section 202 (c) (3) of the Housing and Rent Act of 1947 as amended.

3. Plaintiff is entitled to an order requiring defendant to refund $18.66 to Stephen Jason and $137.88 to Roy E. Burris.

4. Plaintiff is entitled to a permanent injunction against the defendants as prayed for in the complaint.

Dated: Utica, New York, March 25, 1949.

(S) STEPHEN W. BRENNEN,
U. S. D. J.

In the District Court of the United States for the Eastern District of Michigan, Southern Division

Civil Action No. 7977

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, PLAINTIFF

v.

HARRY L. ANDERSON, 3967 ST. CLAIR STREET, DETROIT, MICHIGAN, DEFENDANT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT

This cause came on for hearing on the Complaint filed by the plaintiff, Answer of defendant and other pleadings, statements of counsel and evidence submitted to the Court. Upon consideration thereof the Court finds specially that:

1. Plaintiff filed the above action as Housing Expediter under the provisions of the Housing and Rent Act of 1947, as amended, seeking restitution to the tenants, or in the alternative to the United States, and a final injunction, restraining violation of the Housing and Rent Act of 1947, as amended, by the defendant.

2. The defendant, Harry L. Anderson, is the owner, landlord, and operator of the housing accommodations located at 2524–26 Pennsylvania, Detroit, Michigan, within the Detroit Defense-Rental Area.

3. Counsel for defendant stipulated in open Court that providing the housing accommodations involved herein are subject to control, the rental units, the names of the tenants, the periods of occupancy, the maximum legal rents, and the rents received by the defendant, all as set forth in Schedule "A" attached to plaintiff's Complaint are correct.

4. The sole issue raised by the defendant in this

case was that under Section 202 (c) (3) of the Housing and Rent Act of 1947, as amended, the defendant had created additional housing accommodations by conversion after February 1, 1947, and the housing accommodations involved herein were decontrolled.

5. The Controlled Housing Rent Regulation defines conversion as "(2) a structural change in a residential unit. * * * involving substantial alterations or remodeling and resulting in the creation of additional housing accommodations."

6. In Interpretation 2 of Section 1 (b) 2, issued August 25, 1948, paragraph v–4 applies the requirement that for decontrol in this respect there must be a structural change involving substantial alterations or remodeling. Section 5 requires that where there has been a structural change involving substantial alterations or remodeling, decontrol occurs only if additional housing accommodations result from this work. Section 6 requires that in determining whether additional housing accommodations have been created, the primary test is not whether there are more tenants in occupancy than before the conversion. The determination is made by comparing the number of dwelling units before and after the conversion.

7. On November 25, 1947, the defendant purchased the premises consisting of four unfurnished five-room dwelling accommodations, each containing a living room, dining room, two bedrooms, kitchen, and bathroom, and each occupied by one family.

8. These four families vacated the premises on and after December 18, 1947, and the defendant then painted and decorated the premises, placed a Frigidaire and stove in each of the four kitchens, installed furnaces, hot water tanks, gutters, a wiring system,

and put locks on the doors. Some janitor service and some furnishings were provided.

9. The defendant then rented each of the identical five-room units to two families, one family occupying the living room and dining room and the other family occupying the two bedrooms, both families sharing the kitchen and bathroom.

10. No structural changes were made and no additional housing accommodations were created. The services and equipment furnished and the painting and decorating performed by the defendant do not constitute a conversion. On the contrary there resulted a restriction in the housing accommodations in that where formerly one family had the use of the kitchen and bathroom, after the change in rental plan, two families shared the kitchen and bathroom.

11. The claim of overcharges as to tenant, Joseph Johnson, was withdrawn from consideration in this case, on the ground that this tenant filed an independent action against the defendant herein to recover such overcharges.

12. From January 30, 1948, to October 7, 1948, said defendant demanded and received from Clyde Haines, rents in excess of the maximum legal rents for the use and occupancy of the upper south front rooms of said housing accommodations in the sum of $378.00.

13. From March 1, 1948, to September 11, 1948, said defendant demanded and received from S. K. Haines for the use and occupancy of the upper north front rooms of said housing accommodations, rents in excess of the maximum legal rent in the sum of $286.00.

14. From September 11, 1948, to December 11, 1948, said defendant demanded and received from Barbara Means for the use and occupancy of the

upper north front rooms of said housing accommodations, rents in excess of the maximum legal rent in the sum of $123.50.

15. From December 18, 1948, to February 5, 1949, said defendant demanded and received from James Haguely for the use and occupancy of the upper north front rooms, and from March 27, 1948, to December 18, 1948, for the use and occupancy of the upper north rear rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of $368.50.

16. From January 6, 1948, to February 3, 1949, said defendant demanded and received from W. Hawkins for the use and occupancy of the lower north front rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of $560.00.

17. From January 7, 1948, to February 3, 1949, said defendant demanded and received from C. Arnold for the use and occupancy of the lower north rear rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of $465.00.

18. From January 1, 1948, to February 3, 1949, said defendant demanded and received from Theo. Wimberly for the use and occupancy of the lower south front rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of $475.00.

19. From January 1, 1948, to February 5, 1949, said defendant demanded and received from Alma Webb for the use and occupancy of the lower south rear rooms of said housing accommodations, rents in excess of the maximum legal rents in the sum of $417.50.

Conclusions of Law

1. This Court has jurisdiction of the subject matter of this action and of the parties thereto pursuant to Section 206 (b) of the Housing and Rent Act of 1947, as amended.

2. At all times since July 1, 1947, such accommodations have been subject to the rent controls provided in the Housing and Rent Act of 1947, as amended, and are still subject thereto.

3. Said accommodations are not free from such controls or eligible to decontrol under the provisions of Section 202 (c) of the Housing and Rent Act of 1947, as amended.

4. Defendant, Harry L. Anderson, violated the provisions of the Housing and Rent Act of 1947, as amended, by demanding, accepting, and receiving for such accommodations rentals therefor in excess of the maximum legal rent prescribed by the Housing and Rent Act of 1947, as amended, and the Controlled Housing Rent Regulation issued thereunder.

5. Plaintiff is entitled to a mandatory injunction requiring the defendant to pay to the Treasurer of the United States the sum of $3,073.50 for the use and benefit of the tenants set out in the Findings of Fact, as follows:

Clyde Haines	$378.00
S. K. Haines	286.00
Barbara Means	123.50
James Haguely	368.50
W. Hawkins	560.00
C. Arnold	465.00
Theo. Wimberly	475.00
Alma Webb	417.50
Total	3,073.50

6. Plaintiff is entitled to an injunction enjoining the defendant, his agents, servants, employees, and

all persons in active concert or participation with the defendant from:

(a) Soliciting, demanding, accepting or receiving any rent in excess of the maximum rent prescribed by the Controlled Housing Rent Regulation as heretofore or hereafter amended or in excess of the maximum rent permitted by any other Order or Regulation heretofore or hereafter adopted pursuant to the Housing and Rent Act of 1947 as heretofore or hereafter amended, extended or superseded; and said Order shall apply to the housing accommodations involved in this action and to any other controlled housing accommodations now or hereafter owned, managed or operated by defendant.

(b) Committing any other violation of said Act or Regulation as the same is now or may hereafter be amended, extended or superseded.

7. Plaintiff is entitled to recover the costs of this proceeding.

———— ————,

United States District Judge.

Dated: June 20, 1949.

United States District Court for the Northern District of New York

Civil No. 3138

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, PLAINTIFF

v.

EDYTHE COMSTOCK, DEFENDANT

FOLEY, *D. J.:*

This is the usual action of the Housing Expediter based upon alleged violations by the defendant of particular provisions of the Housing and Rent Act of

1947, as amended and the Emergency Price Control Act of 1942, as amended. The complaint asks for restitution of the alleged overcharges to the tenants involved, injunctive relief, and penalty money damages in favor of the Housing Expediter.

The premises involved are located at 776 James Street, Syracuse, New York, and the dispute as to the decontrol and overcharge is confined to the second floor front unit and the first floor rear unit of such property. The action was tried and the witnesses in behalf of the government were the Area Rent Attorney for the particular area involved and the previous owner of the property. The defendant in person was the sole witness for the defense. It is interesting to note that neither of the tenants involved in the alleged overcharge testified in the action.

By the answer of the defendant, the issue presented is whether or not the substantial alteration of the premises by the defendant resulted in legal decontrol of the particular units in question. This problem must be resolved by the application of the provisions of section 202 (c) (3) of the Housing and Rent Act of 1947, as amended, and section 1 (b) (2) (ii) (a) of the Controlled Housing Rent Regulation effective April 1, 1948, which was formerly called section 1 (b) (8).

The evidence submitted by the defendant does not meet the best of decontrol as outlined in the Act and Regulation above, and particularly does not meet the administrative interpretation as to the creation of additional housing accommodations. I must follow such administrative interpretation unless "plainly erroneous or inconsistent with the regulation." (*Bowles* v. *Seminole Rock and Sand Co.,* 325 U. S. 410, 413.) The administrative interpretation under the Act and Regulation mainly confines the proposition of decontrol to the creation of additional housing accommoda-

tions in a particular unit or units. The over-all alteration of property which increases housing accommodations in general cannot effect decontrol of the premises as a whole.

On the trial of this action, I received proof as to the extensive alterations by the defendant which admittedly improved a deteriorating property. It was received because of unfamiliarity with the regulation and its interpretation, and for the more important purpose of determining the willfulness of the defendant in the alleged overcharges and her good faith in believing that the premises were legally decontrolled. From the evidence as a whole it is my judgment that the acts of the defendant were not willful in their nature. With her attorney she had various conferences with the Area Rent officials, and her actions throughout her difficulty do not characterize her as a scheming, knowing and concealing violator. Her transgression was ignorance and a failure to properly pursue administrative remedies to adjust her situation. Under a changing governmental policy, she would be praised for her stimulation to the building and construction trades.

As to the alleged overcharge in relation to the second floor front, the attorney for the defendant admitted the overcharge except for the month of February 1948. The plaintiff in its case produced no proof to contradict this denial. Defendant testified she did not remember being paid the February 1948 rental.

From the reasons as outlined, I arrive at these findings and conclusions: That there was no increase of housing accommodations in the second floor front unit of the premises owned by the defendant and located at 776 James Street, Syracuse, New York. That there was an overcharge of $42.50 to the tenant of that unit,

Charles A. Fager, for the rental period from October 1, 1947 to January 31, 1948. That the total amount of such overcharge is $170. That the violation of the defendant under the circumstances was not willful.

That there was no increase of housing accommodations in the first floor rear unit located in premises owned by defendant at 776 James Street, Syracuse, New York. That there was an overcharge of $20 to the tenant of that unit, Earl A. White, for the rental period July 21, 1947 to August 21, 1947. That the total amount of such overcharge was in the sum of $20. That the violation of the defendant under the circumstances was not willful.

My conclusions of law are these: That the court has jurisdiction of the persons and subject matter. That judgment may enter directing refund to Charles A. Fager in the amount of $170 and to Earl A. White in the sum of $20, and otherwise the relief prayed for in the complaint is denied. All motions by the defendant and reserved upon throughout the trial are hereby denied.

Dated: Albany, New York, September 22, 1949.

United States District Court for the District of Massachusetts

Civil Action File No. 7622

TIGHE E. WOODS, HOUSING EXPEDITER, OFFICE OF THE HOUSING EXPEDITER, PLAINTIFF

v.

OSCAR J. SEGUIN, DEFENDANT

FINDINGS AND CONCLUSIONS

This case came on for a hearing on the merits without jury. The parties were represented by coun-

sel and were heard. Oral testimony was taken and counsel argued. The pleadings consist of a Complaint, Defendant's Answer, Plaintiff's Request for Admissions, Defendant's Answers to Plaintiff's Request for Admissions, and Plaintiff's Motion for Summary Judgment.

FINDINGS

1. The Defendant, Oscar J. Seguin, is a resident of Springfield, Massachusetts, and at all times material hereto was the landlord of the premises known as the second floor apartment, 826 Liberty Street, Springfield, Massachusetts.

2. The premises are located in the Springfield Defense-Rental Area.

3. The maximum legal rent for the second floor apartment, 826 Liberty Street, Springfield, Massachusetts, as established under the Rent Regulation for Housing (10 F. R. 13528), as amended, issued pursuant to Section 2 (b) of the Emergency Price Control Act of 1942, as amended, and under Controlled Housing Regulation (12 F. R. 4331), issued pursuant to the Housing and Rent Act of 1947, as amended, was twenty-seven dollars ($27.00) a month.

4. Angelo Peters, also known as Peter P. Hatzepetra, occupied the second floor apartment, 826 Liberty Street, Springfield, Massachusetts, on the maximum rent date, March 1, 1942, until sometime in April of 1947 and paid twenty-seven dollars ($27.00) per month rent during this entire period. This apartment was unfurnished and unheated, according to the registration of the apartment in question in the Springfield Area Rent Office. The equipment included running water, flush toilet, bathroom, electricity installed. Services included cold water, paint-

ing and decorating, interior repairs, and exterior repairs.

5. Sometime after Angelo Peters moved from the premises in question in April of 1947, and before Romeo Letendre and other occupants moved into the premises in question, the Defendant, Oscar J. Seguin, made the following improvements and added the following services: painted and papered every room, including the bathroom; extended steam piping from the downstairs store to this second floor apartment; installed a radiator in each room (never before); completely furnished the apartment with ample and better than fair furnishings; and furnished heat, hot water, electricity, and gas (never before). The Defendant, Oscar J. Seguin then rented the premises to various occupants.

6. Romeo Letendre was an occupant of a part of the premises in question from September 22, 1947, to the date of the trial of this case on January 11, 1949, and is still an occupant. He was first an occupant of the front bedroom for a short period of time paying twelve dollars ($12.00) a week. Letendre then became an occupant of what had been a dining room and a living room which were used by him as follows: The dining room was changed into a living room and the living room into a bedroom. Letendre (with material furnished by the Defendant, Seguin) built a clothes closet in the room that had been a living room and now is a bedroom. Letendre paid eleven dollars ($11.00) a week for the use of those two (2) rooms furnished, along with kitchen privileges and the use of the bathroom, and still occupies these two (2) rooms.

7. R. W. Dercole was an occupant of the rear bedroom, furnished from about approximately September 22, 1947 to April 18, 1948, paying ten dollars

($10.00) per week having kitchen privileges and the use of the bathroom.

8. Either before Letendre was an occupant of the front bedroom or after he moved from it to the other two (2) rooms, a man named Saunders was an occupant of the front bedroom. For a period of time, at present unknown, Saunders paid twelve dollars ($12.00) per week for this room having kitchen privileges and the use of the bathroom.

9. Angelo Peters was shown a plan, or chalk, which was in evidence as an exhibit, of the second floor apartment, 826 Liberty Street, Springfield, Massachuetts. Mr. Peters stated that the plan fairly represented the five (5) rooms, including the bathroom, as they were while occupied by him from about March 1, 1942, to sometime in April 1947, with the exception that a closet had been installed in the living room.

10. Romeo Letendre, an occupant of the premises in question, when shown the plan, or chalk, of the second floor apartment, 826 Liberty Street, Springfield, Massachusetts, said that the plan shows the five (5) rooms and bathroom exactly as they were when he became an occupant of the premises in question and the plan shows the five (5) rooms and bathroom exactly as they are as of the date of trial, January 11, 1949. Mr. Letendre installed a closet in a room that had been a living room and then used it for a bedroom. This closet is indicated on the plan or chalk.

11. Mrs. Bourgoise who has been a tenant of the third floor apartment at 826 Liberty Street, Springfield, Massachusetts, for a period of at least seven (7) years testified that she had visited the second floor apartment at 826 Liberty Street, Springfield, Massachusetts, many times while Angelo Peters was

a tenant there. When shown the plan or chalk of the second floor apartment, Mrs. Bourgoise said the plan showed the five (5) rooms and the bathroom exactly as they were while Mr. Peters was a tenant, with the exception of a closet that had been added to the living room. Mrs. Bourgoise further said that she had been in the apartment in question several times since the Defendant, Seguin, had made the improvements and increased the services (she had been in this apartment within the past week before the trial of this case) and the plan shows the five (5) rooms and bathroom exactly as they are now.

12. Both Letendre and the Defendant, Seguin, said that three (3) couples, including Letendre, had occupied this second floor apartment continuously, with maybe a few weeks interval, from about September 22, 1947, to the date of trial, January 11, 1949. Letendre had been collecting money from the other two (2) couples and turning over thirty-three dollars ($33.00) a week each week since about June 1948, including his payment for use of two (2) rooms, to the Defendant, Seguin.

13. The sole issue raised by the Defendant in this case was that under Section 202 (e) (3) of the Housing and Rent Act of 1947, as amended, the Defendant had created additional housing accommodations by conversion after February 1, 1947.

14. The second floor space consisted originally of five (5) rooms. There are still five (5) rooms no matter whether they are rented to one occupant or three occupants. The connection with the central heating system by extension of piping and the installation of radiators in each room did not increase the number of rooms. No more and no less were available than before.

15. Assuming that there are additional units, such

were not created by conversion. Any additional unit, if it could be called such, results merely from a change in the rental plan. The space in existence before February 1, 1947, could have been rented to three (3) different occupants or couples in the same manner as now in effect. There has been no conversion work creating a change in a physical sense which results in ability to institute the present system of letting to three (3) different persons, or couples.

16. The mere providing of additional facilities to improve existing accommodations does not create new accommodations nor can it be said that a facility which is newly provided, e. g., the furnishing with radiators with steam heat where none previously existed, is itself the housing facility which was created by conversion. Furniture, services, and facilities are not in themselves housing accommodations. They are included in the definition only insofar as they are connected with the use and occupancy of the basic structure and are taken together with it to constitute the complete housing accommodations.

17. The Controlled Housing Rent Regulation defines conversion as "(2) a structural change in a residential unit * * * involving substantial alterations or remodeling and resulting in the creation of additional housing accommodations."

18. In Interpretation 2 of Section 1 (b) (2), issued August 25, 1948, paragraph V–4 applies the requirement that for decontrol in this respect there must be a structural change involving substantial alterations or remodeling. I find no such change in this case. Applying the example stated, I say that a renting to more than one tenant does not achieve decontrol. Section 5 requires, that, in the event of conversion, decontrol depends on *resulting* additional units. No additional units *result* from the work done. If any, they

result only from a change in the method of renting.

19. It is my opinion that the housing accommodations were not changed so as to result in an increase of dwelling units. In substance, the landlord rented a furnished housing accommodation as one unit and not as three.

20. The apartment in question not being decontrolled, I find that the maximum legal rent at all times for that apartment to the present date is twenty-seven dollars ($27.00) a month. The Defendant, under the Housing Regulations, Emergency Price Control Act and Controlled Housing Regulations, Housing and Rent Act of 1947, as amended, could have filed a petition for an increase in rent setting forth major capital improvements and additional services. This Defendant was notified by the Springfield Area Rent Office on several occasions that he should file a petition for an increase in rent, but the Defendant failed to heed this advice.

21. As the maximum legal rent at all times to the present date remains twenty-seven dollars ($27.00) a month for the second floor apartment, 826 Liberty Street, Springfield, Massachusetts, I find that all rent collected in excess of that amount by the Defendant, Seguin, to be in violation of the Rent Regulations for housing accommodations in the way of an overcharge.

22. The total overcharges in rent for the second floor apartment, 826 Liberty Street, Springfield, Massachusetts, from the period September 22, 1947 to April 14, 1948 (a gap of a few weeks during which Letendre and the Defendant, Seguin, said certain rooms might not be occupied during turnover), and May 4, 1948 to January 11, 1949, amounted to one thousand seven hundred four dollars and sixty-nine cents ($1,704.69).

23. The overcharges, as to occupant, Romeo Leten-

dre, for the housing accommodations occupied by him amount to five hundred eighty-four dollars and thirty-five cents ($584.35) for a period of approximately sixty-five (65) weeks.

24. The overcharges as to occupant R. W. Dercole for the housing accommodations occupied by him amount to two hundred forty-five dollars and forty cents ($245.40) for a period of approximately thirty (30) weeks.

25. The overcharges as to occupant, Saunders, period of time unknown, and as to other occupants now unknown amount to eight hundred seventy-four dollars and ninety-four cents ($874.94).

CONCLUSION

On the evidence (at all times material hereto), I conclude that the premises known as the second floor apartment, 826 Liberty Street, Springfield, Massachusetts, are controlled housing accommodations under the provisions of the Emergency Price Control Act of 1942 (U. S. C. A., App. Section 901 et seq.), as amended, and of the Housing and Rent Act of 1947, as amended, and that the Defendant, Oscar J. Seguin, is the landlord thereof. I conclude that no additional housing accommodations were created by conversion on or after February 1, 1947, in the second floor apartment, 826 Liberty Street, Springfield, Massachusetts. That being so, I further conclude that the premises in question remained under rent control, under the Housing and Rent Act of 1947, as amended. I am satisfied that the maximum legal rent for the premises in question is twenty-seven dollars ($27.00) per month. I am also satisfied that the Defendant has violated the Housing and Rent Act of 1947, as amended, by requiring the occupants, Romeo Letendre, R. W. Dercole, one Saunders, and other persons

not known, to pay rent in excess of the maximum legal rent for the premises in question. I conclude that there is a violation by way of an overcharge, and I find that the overcharge in rent amounts to one thousand seven hundred four dollars and sixty-nine cents ($1,704.69).

Judgment may be entered in accordance with paragraph 1 of the Plaintiff's Prayer, requiring refund of the overcharge in the amount of five hundred eighty-four dollars and thirty-five cents ($584.35) to the occupant, Romeo Letendre; also requiring refund of the overcharge of two hundred forty-five dollars and forty cents ($245.40) to the former occupant, R. W. Dercole; also requiring the refund of the remaining overcharge of eight hundred seventy-four dollars and ninety-four cents ($874.94) in part to one Saunders and to the other occupants now unknown; and further in accordance with paragraph 2 of the Plaintiff's Prayer, the Defendant, his agents, servants, employees, and attorneys shall be permanently enjoined from soliciting, demanding, accepting or receiving any rent for the use or occupancy of the housing accommodations described herein, or of any other controlled housing accommodations in excess of the maximum rents established pursuant to the Housing and Rent Act of 1947, as amended, or any regulation issued thereunder, as heretofore or hereafter amended, revised, or reissued; and from offering or agreeing to do any of the aforesaid. The Defendant shall further be permanently enjoined generally from violating the Housing and Rent Act of 1947, as amended. In accordance with paragraph 4 of the Plaintiff's Prayer, the Defendant (who testified in Court that he had original rent records at home) shall, from his original rent records furnish the Plaintiff with the names, the period of occupancy, and the

amount of money paid to the Defendant by one Saunders and other occupants, now unknown to the Plaintiff, during the period January 22, 1947, to April 14, 1948, and the period May 4, 1948, to January 11, 1949. Further in accordance with paragraph 4 of the Plaintiff's Prayer, if the Plaintiff is unable to locate said Saunders, or any of the occupants whose names are to be furnished the Plaintiff by the Defendant, the money due to said Saunders, or the other occupants shall be paid to the Treasurer of the United States.

Costs of Court shall be awarded the Plaintiff.

Form of Judgment may be submitted by the Plaintiff on notice.

Dated at Boston, Massachusetts, this ——— day of January 1949.

———— ————,

Judge, United States District Court.

U. S. GOVERNMENT PRINTING OFFICE: 1950